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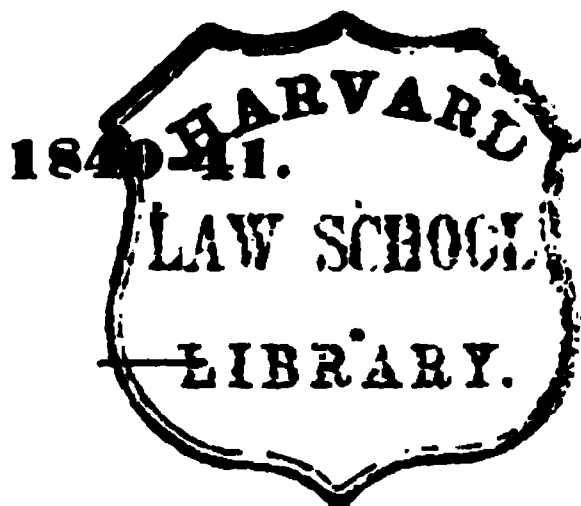
OF 1006

CASES ARGUED AND DETERMINED

1841

THE SUPREME COURT OF TENNESSEE,

DURING THE YEARS



BY WEST H. HUMPHREYS,

STATE REPORTER.

VOLUME II.

COLUMBIA:

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1842.

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OBITUARY.

FELIX GRUNDY, ESQ.

SUPREME COURT, DECEMBER TERM, 1840.

Edwin H. Ewing, Esq., announced to the Supreme Court, the death of the Hon. FELIX GRUNDY on the 19th December, 1840, a member of this bar, and moved as a mark of respect to his memory, that the court adjourn. Whereupon, the court immediately adjourned till next day morning half past nine o'clock.

On the annunciation of the death of Mr. Grundy, a meeting of the members of the bar of the Supreme Court was held, with a view of paying appropriate honors to the memory of the deceased.

Resolutions were adopted, and Mr. Thomas Washington was appointed to present them to the Supreme Court, ask their concurrence, and move that they be spread upon the minutes of the court.

The following are the remarks of Mr. Washington, and the resolutions:

May it please your Honors: I have been deputed by my brethren to perform the melancholy duty of announcing the proceedings of the members of the bar and officers of the court, in pursuance of the object of the adjournment on yesterday. These proceedings relate to the death of our late brother and friend Felix Grundy. On Saturday afternoon, the 19th inst., he died, calmly yielding his spirit into the hands of Him who gave it. The consolation was vouchsafed to him of being surrounded in his dying hours by his own family, and of breathing out his last sigh upon the bosom of her who had been the partner of his joys and sorrows for the last forty years.

Mr. Grundy was endowed by nature, with an intellect of a very high order. He was a consummate judge of human nature, and with almost intuitive sagacity could determine as to the character

of his audience, and what topics would be likely to influence their judgment. He was no less skilful as to the proper order and manner of presenting these topics. Unrivalled in these qualities and accomplishments, his eloquence too, was of an order far above the standard by which good speakers are estimated—his action was characterised by singular propriety—his style was uniformly correct and perspicuous—his delivery was always easy, to himself natural, and excited pleasing sensations in his audience—his voice was strong and clear, but never harsh; he always spoke forcibly and had the happy faculty of carrying his audience with him through the ramifications of an argument, without fatigue, and without any difficulty in comprehending his meaning. There was nothing in his nature sarcastic or severe, but he had a fine playful wit, and his portraitures of the incidents of common life, and of the actors in them, were eminently ludicrous, well timed and effective.

In the domestic and social circle Mr. Grundy was every thing that his most ardent friends and admirers could have wished; amiable, gentle and courteous, free from personal resentment and animosities; always ready to forgive injuries and render kind offices, shunning collision for the sake of harmony, even at the sacrifice of his own just rights. He was one of the brightest ornaments of the bar, whose loss we deeply deplore. I, therefore, move in behalf of the bar and of the officers of the court, that the resolutions adopted by them be spread on the minutes of their proceedings, and which are as follows:

At a meeting of the Supreme Court of Tennessee, at the court house in Nashville, on Monday the 21st day of December, 1840, after the morning business had been disposed of, Edwin H. Ewing announced to the court the death of the Hon. Felix Grundy, late a member of the bar of this court, and moved an adjournment till to-morrow morning, which was accordingly done.

And, thereupon, at a meeting of the members of the bar and of the officers of the court, at the court room on the same day, the Hon. G. W. Campbell was called to the Chair, and Andrew Ewing was appointed Secretary, and upon the motion of Thomas Claiborne, the Chairman appointed Thomas Washington, F. B. Fogg and R. J. Meigs a committee, by whom the following resolutions were submitted and adopted, viz:

Resolved, That the members of this bar and the officers of this court, feel with deep sensibility the loss which the profession and

the country have sustained in the death of Felix Grundy, a member of this bar.

RESOLVED, That we cherish the highest respect for the professional learning of the deceased, for the purity and uprightness of his professional life, and for the amiable and excellent qualities which belonged to him as a man.

RESOLVED, That to testify these sentiments we will wear the usual badge of mourning for the residue of the term.

RESOLVED, That the Chairman communicate to the family of the deceased a copy of the above resolutions, and assure them of the sincere condolence of the members of the bar and of the officers of the Supreme Court, on account of their great and irreparable loss.

RESOLVED, That Mr. Washington do move the court, that these resolutions and proceedings be entered upon their minutes.

The Supreme Court concurring in them, they were accordingly entered on the minutes. Court thereupon adjourned.

INDEX OF CASES.

A		Bryan <i>vs.</i> Glass' securities	390
Agey, Baker & Hunter <i>vs.</i>	13	Bullard <i>vs.</i> Copps	409
Allen, The State <i>vs.</i>	258	Bullard, Peck <i>vs.</i>	41
Alton, Dewy & Tailor <i>vs.</i>		C	
Robinson, <i>Ex'x.</i>	341	Cagle & Boling, The State	
Atkinson <i>vs.</i> Cooper	361	<i>vs.</i>	414
Aymette <i>vs.</i> The State	154	Cage, <i>adm'r</i> , Rigs, Aertson	
B		& Son <i>vs.</i>	350
Baker & Hunter <i>vs.</i> Agey	13	Campbell <i>vs.</i> Baldwin	248
Baldwin <i>vs.</i> Baldwin	473	Campbell, Franklin and Co-	
Baldwin, Campbell <i>vs.</i>	248	lumbia T. Co. <i>vs.</i>	467
Baldwin <i>vs.</i> Marshall	116	Campbell, Keaton's <i>distri-</i>	
Bank, Alabama, <i>vs.</i> Berry	443	<i>butees vs.</i>	224
Bank, F. and M., <i>vs.</i> Harris	311	Cannon, Leake <i>vs.</i>	169
Bank, Planters', Knott <i>vs.</i>	493	Cannon, Hughes <i>vs.</i>	589
Bank, Planters', <i>vs.</i> Tappan	95	Cannon, Overton's <i>heirs vs.</i>	264
Bank, Planters', <i>vs.</i> White	112	Caplinger <i>vs.</i> Sullivan	548
Bank, Union, <i>vs.</i> Carr and		Carr and Boyers, Union	
Boyers	345	Bank <i>vs.</i>	345
Bank, Union, and Norvell,		Carroll, Goodrum <i>vs.</i>	490
Van Wyck <i>vs.</i>	192	Caswell & Hill, The State	
Bank, Union, Williams and		<i>vs.</i>	399
Chalmers <i>vs.</i>	339	Caswell & Hill <i>vs.</i> The	
Barry <i>vs.</i> Nuckolls	324	State	402
Bell <i>vs.</i> Steel	148	Catron, Napier <i>vs.</i>	534
Benson, Hunt & Co. <i>vs.</i>	459	Chester <i>vs.</i> Hubbard and	
Booker and Clarkson <i>vs.</i>		Anderson	354
Tally	308	Childress, Miller <i>vs.</i>	320
Boyd <i>vs.</i> The State	39	Childress, Raines <i>vs.</i>	449
Bradley <i>vs.</i> Commissioners	428	Clark <i>vs.</i> Williams	303
Bream <i>vs.</i> Dickerson &		Claxton <i>vs.</i> The State	181
Shrewsberry	126	Cocke <i>vs.</i> Porter	15
Bridges <i>vs.</i> Vick	516	Coleman <i>vs.</i> Pinkard	185
Brown <i>vs.</i> Dickson	395	Commissioners, Bradley <i>vs.</i>	428
Brown and Smithers, John-		Commissioners, McCon-	
son <i>vs.</i>	327	nell <i>vs.</i>	53

Conrad, Washington <i>vs.</i>	562	Gillespie and Peck <i>vs.</i> Cunningham	19
Conway, Jarnagin <i>vs.</i>	50	Gilmore, Wilkins <i>vs.</i>	140
Cooper, Atkinson <i>vs.</i>	361	Glass' <i>securities</i> , Bryan <i>vs.</i>	390
• Copeland <i>vs.</i> Woods	330	Goodman <i>vs.</i> Floyd	59
Copps, Bullard <i>vs.</i>	409	Goodrum <i>vs.</i> Carroll	490
Crockett <i>vs.</i> Campbell	411	Grace <i>vs.</i> Hale	27
Crocket, Harper & Co. <i>vs.</i> Wright	322	Grandison <i>vs.</i> The State	451
Crosby, Hill <i>vs.</i>	545	Grigsby <i>vs.</i> Moffat	487
Cross, The State <i>vs.</i>	301	Guthrie, <i>et ux.</i> <i>vs.</i> Owen	202
Cummings <i>vs.</i> Freeman	143	H	
Cunningham, Peck & Gillespie <i>vs.</i>	15	Hadley <i>vs.</i> Harpeth Turnpike Company	555
Curle, Dougherty <i>vs.</i>	453	Hale, Grace <i>vs.</i>	27
Currin, Hinkle <i>vs.</i>	137	Hale <i>vs.</i> Landrum	32
D		Hannum, Petty <i>vs.</i>	102
Dains <i>vs.</i> The State	439	Harris, F. & M. Bank <i>vs.</i>	311
Damron, Roach <i>vs.</i>	425	Harrison, Tappan <i>vs.</i>	172
Delozier, Pickens <i>vs.</i>	400	Harrison <i>vs.</i> Turbeville	242
Dickerson and Shrewsberry, Bream <i>vs.</i>	126	Harwell <i>vs.</i> Worsham	524
Dickson, Brown <i>vs.</i>	395	Haywood <i>vs.</i> Moore	584
Dobkins <i>vs.</i> The State	424	Helm <i>vs.</i> Wright & Graham	72
Donelson, Muse <i>vs.</i>	166	Henly <i>vs.</i> Neal	551
Dougherty <i>vs.</i> Curle	453	Hicks, Knott <i>vs.</i>	162
Dunn <i>vs.</i> Winters	512	Hick, <i>adm'r</i> , Long and Byrne <i>vs.</i>	305
E		Hill <i>vs.</i> Crosby	545
Elijah <i>vs.</i> The State	455	Hinkle <i>vs.</i> Currin	137
Elkins <i>vs.</i> The State	543	Hodges <i>vs.</i> The Mayor	61
Estes <i>vs.</i> The State	496	Hubbard and Anderson, Chester <i>vs.</i>	354
Ewing, Martin <i>vs.</i>	559	Hughes <i>vs.</i> Cannon	589
F		Hunt & Co. <i>vs.</i> Benson	459
Fancher, Martin <i>vs.</i>	510	Hurst, Powers <i>vs.</i>	24
Fleming & Frierson, Webster <i>vs.</i>	518	Hurt, Williams <i>vs.</i>	68
Floyd, Goodman <i>vs.</i>	59	J	
Fowler <i>vs.</i> Norman	384	James, Pucket <i>vs.</i>	565
Franklin and Columbia T. Co. <i>vs.</i> Campbell	467	Jameson & Johnson, Tatum <i>vs.</i>	298
Frazier and McKinney, Wilson <i>vs.</i>	30	Jameson's <i>legatees vs.</i> Shelby, <i>ex'r</i> ,	198
Freeman, Cummings <i>vs.</i>	143	Jarnagin <i>vs.</i> Conway	50
Fugate <i>vs.</i> The State	397	Jobe <i>vs.</i> O'Brien	34
G		Johnson <i>vs.</i> Brown and Smithers	327
Gaines, Robertson <i>vs.</i>	367	Johnson & Heam <i>vs.</i> Morgan, Allison & Co.	115
Gallaher, Saunders & Martin <i>vs.</i>	445	Johnson <i>vs.</i> Perry	569
Gill, <i>ex'r</i> , Perry and Patterson, <i>adm'rs</i> , <i>vs.</i>	218		

INDEX OF CASES.

ix

Johnson, Sheppard <i>vs.</i>	285	Peck <i>vs.</i> Bullard	41
Johnson, <i>et ux.</i> <i>vs.</i> The State	283	Peek <i>vs.</i> The State	78
K		Perdue <i>vs.</i> The State	494
Kay, Vanzant <i>vs.</i>	106	Perry, Johnson <i>vs.</i>	569
Keaton's <i>distributees vs.</i>		Perry and Patterson, <i>adm'r,</i>	
Campbell	224	<i>vs.</i> Gill, <i>ex'r</i>	218
Kirk, Martin <i>vs.</i>	529	Petty <i>vs.</i> Hannum	102
Knott <i>vs.</i> Hicks	162	Pickens <i>vs.</i> Delozier	400
Knott <i>vs.</i> Planters' Bank	493	Pinkard, Coleman <i>vs.</i>	185
L		Polk <i>vs.</i> Plummer	500
Landrum, Hale <i>vs.</i>	32	Polk <i>vs.</i> Ralston	537
Leake <i>vs.</i> Cannon	169	Polk <i>vs.</i> Wisener	520
Long and Byrne <i>vs.</i> Hicks	305	Porter, Cocke <i>vs.</i>	15
Love, Rodgers <i>vs.</i>	417	Powers <i>vs.</i> Hurst	24
M		Price <i>vs.</i> Upshaw	142
Macon and Bailey <i>vs.</i> Shep-		Pucket <i>vs.</i> James	565
pard	335	Pyland, Russell <i>vs.</i>	131
Marshall, Baldwin <i>vs.</i>	116	R	
Martin <i>vs.</i> Ewing	559	Raines <i>vs.</i> Childress	449
Martin <i>vs.</i> Fancher	510	Ralston, Polk <i>vs.</i>	537
Martin <i>vs.</i> Kirk	529	Reid <i>vs.</i> House	576
Mayor, Hodges <i>vs.</i>	61	Rich <i>vs.</i> Rayle	404
McCall's <i>heirs,</i> Smith <i>vs.</i>	163	Rickets, Stewart <i>vs.</i>	151
McConnell <i>vs.</i> Commissioners	53	Ridley, <i>et ux.</i> <i>vs.</i> McNairy	174
McDonald, Trigg <i>vs.</i>	386	Rigs, Aertson & Son <i>vs.</i>	
McIntire <i>vs.</i> McLaurin	71	Cage, <i>adm'r</i>	350
McNairy, Ridley, <i>et ux.</i> <i>vs.</i>	174	Roach <i>vs.</i> Damron	425
McNeal, Trezevant <i>vs.</i>	352	Roberts <i>vs.</i> Rose and Mat-	
Miller <i>vs.</i> Childress	320	thews	145
Miller <i>vs.</i> Moore	421	Robertson <i>vs.</i> Gaines	367
Moffat, Grigsby <i>vs.</i>	487	Robinson, <i>executrix,</i> Alton,	
Moffit <i>vs.</i> The State	99	Dewy and Tailor <i>vs.</i>	341
Moody, Whaley <i>vs.</i>	495	Rodgers <i>vs.</i> Love	417
Moore, Haywood <i>vs.</i>	584	Rogers <i>vs.</i> Winton	178
Morgan, Allison & Co.,		Russell <i>vs.</i> Pyland	131
Johnson & Heam <i>vs.</i>	115	S	
Muse <i>vs.</i> Donelson	166	Sanderlin <i>vs.</i> The State	315
N		Saunders & Martin <i>vs.</i> Gal-	
Napier <i>vs.</i> Catron	534	laher	445
Neal, Henly <i>vs.</i>	551	Saunders & Martin <i>vs.</i> Tur-	
Nicholson <i>vs.</i> Patterson	448	berville	272
Norman, Fowler <i>vs.</i>	384	Simpson & Choat <i>vs.</i> Young	514
Nuckolls, Barry <i>vs.</i>	324	Sharp <i>vs.</i> Wilhite	434
O		Shelby, <i>ex'r,</i> Jameson's <i>leg-</i>	
O'Brien, Jobe <i>vs.</i>	34	<i>atees vs.</i>	198
Overton's <i>heirs vs.</i> Cannon	264	Sheppard <i>vs.</i> Johnson	285
Owen, Guthrie, <i>et ux.</i> <i>vs.</i>	202	Sheppard, Macon and Bai-	
P		ley <i>vs.</i>	335
Patterson, Nicholson <i>vs.</i>	448	Smith <i>vs.</i> McCall's <i>heirs</i>	163

Snell <i>vs.</i> The State	347	Tyler <i>vs.</i> The State	37
State <i>vs.</i> Allen	258	U	
State, Aymette <i>vs.</i>	154	Underwood's Case	46
Steel, Bell <i>vs.</i>	148	Upshaw, Price <i>vs.</i>	142
State, Boyd <i>vs.</i>	39	V	
State <i>vs.</i> Cagle & Boling	414	Vanzant <i>vs.</i> Kay	106
State <i>vs.</i> Caswell & Hill	399	Van Wyck <i>vs.</i> Norvell and	
State, Caswell & Hill <i>vs.</i>	402	the Union Bank	192
State, Claxton <i>vs.</i>	181	Vick, Bridges <i>vs.</i>	516
State <i>vs.</i> Cross	301	W	
State, Dains <i>vs.</i>	439	Walker <i>vs.</i> Wheatly	119
State, Dobkins <i>vs.</i>	424	Washington <i>vs.</i> Conrad	562
State, Elijah <i>vs.</i>	455	Webster <i>vs.</i> Fleming, and	
State, Elkins <i>vs.</i>	543	Frierson	518
State, Estes <i>vs.</i>	496	Whaley <i>vs.</i> Moody	495
State, Fugate <i>vs.</i>	397	White, Planters' Bank <i>vs.</i>	112
State, Grandison <i>vs.</i>	451	Wilhite, Sharp <i>vs.</i>	434
State, Johnson, <i>et ux.</i> <i>vs.</i>	283	Wilkins <i>vs.</i> Gilmore	140
State, Moffit <i>vs.</i>	99	Williams and Chalmers <i>vs.</i>	
State, Peek <i>vs.</i>	78	Union Bank	339
State, Perdue <i>vs.</i>	494	Williams, Clark <i>vs.</i>	303
State <i>vs.</i> Smith	457	Williams <i>vs.</i> Hurt	68
State, Tyler <i>vs.</i>	37	Williamson <i>vs.</i> Webb	133
Stewart <i>vs.</i> Rickets	151	Wilson <i>vs.</i> Frazier and	
Sullivan, Caplinger <i>vs.</i>	548	McKinney	30
Sweeper, Woodfolk <i>vs.</i>	88	Winters, Dunn <i>vs.</i>	512
T		Winton, Rogers <i>vs.</i>	178
Tally, Booker and Clark-		Wisener, Polk <i>vs.</i>	520
son <i>vs.</i>	308	Woodfolk <i>vs.</i> Sweeper	88
Tappan <i>vs.</i> Harrison	172	Woods, Copeland <i>vs.</i>	330
Tappan, Planters' Bank <i>vs.</i>	95	Worsham, Harwell <i>vs.</i>	524
Tatum <i>vs.</i> Jameson & John-		Wright, Crocket, Harper	
son	298	& Co. <i>vs.</i>	322
Taylor <i>vs.</i> Taylor	597	Wright and Graham, Helm	
Trezevant <i>vs.</i> McNeal	352	<i>vs.</i>	72
Trigg <i>vs.</i> McDonald	386	Y	
Turbeville, Harrison <i>vs.</i>	242	Young, Simpson and Choat	
Turbeville, Saunders &		<i>vs.</i>	514
Martin <i>vs.</i>	272		

JUDGES OF THE SUPREME COURT.

HON. NATHAN GREEN,

" WILLIAM B. REESE,

" WILLIAM B. TURLEY.

WEST H. HUMPHREYS, ATTORNEY GENERAL.

ERRATA.

Page 29, line eighteen from bottom, read "here" in place of "henes."

" 47, line ten from top, read "Underwood" in place of "Black."

" 116, line eleven from top, read "judgment rendered" in place of "the levy."

" 178, line three from bottom, read "value" in place of "whole."

" 323, line nine from top, read "endorser" in place of "endorsee."

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE.

KNOXVILLE: JULY TERM, 1840.

BAKER and HUNTER vs. AGEY.

1. The act of 1825, ch. 40, providing that an officer shall have judgment by motion on a bond of indemnity against the principal and securities therein, does not extend to cases where the recovery is had by the defendant in the execution against the officer, but to those cases only, where the title to the property does not reside in the defendant, but in some third person who recovers the value thereof.

2. Acts of Assembly changing the common law mode of proceeding, and giving a summary remedy by motion, must be strictly construed.

James Baker recovered a judgment against Eli Wilson and H. Wilson for fifty-nine dollars. A *fi. fa.* was issued upon this judgment, which came to the hands of Alfred Agey, a constable of Campbell county, who levied it upon a horse, bridle, saddle and blanket, in the possession of Eli Wilson. Agey required a bond of indemnity previous to selling the property, which was given by Baker with A. Hunter as security obligating them in the penalty of five hundred dollars to satisfy and discharge all damages and costs that should be recovered against him as constable for selling the property in any suit or suits thereafter instituted. The property was sold, and Eli Wilson instituted an action of trover in the circuit court of Campbell county against Agey, and recovered a judgment for the sum of one hundred and sixty-six dollars. A. Hunter died, and Tabitha Hunter was appointed his administratrix.

A motion was made by Agey upon the bond of indemnity against Baker and the administratrix of Hunter, in the circuit court of Campbell county, at the September term, 1839, and

[*Baker and Hunter vs. Agey.*]

judgment rendered in favor of the officer for the amount of the recovery had against him, with cost and damages. From this judgment Baker and the administratrix appealed in error to this court.

J. A. McKinney, for plaintiffs in error.

Peck, for defendant in error.

GREEN, J. delivered the opinion of the court.

In this case the defendant in error obtained judgment by motion against the plaintiffs in error on an indemnifying bond, and the only question is whether this case falls within the provisions of the act of 1825, ch. 40. (Car. and Nich. Comp. 183.) That act provides that "in all cases where a sheriff, coroner, or constable may levy an execution on property, the title of which is disputed, and may take a bond of indemnity, and may be sued for so doing by the rightful owner of such property so levied on and sold, and a recovery had against such sheriff, coroner or constable, it shall and may be lawful for such sheriff, coroner or constable, upon motion in any court of record, to obtain judgment against the obligor or obligors, or either of them, on such bond of indemnity for the amount of the damages and costs that may have been recovered against such sheriff, coroner or constable."

This act provides for the single case of a bond of indemnity where the title of the execution debtor to the property levied on is disputed. A judgment by motion is allowed in favor of the officer for the amount the true owner may have recovered of him. The meaning plainly is that the person who disputes the officer's right to levy must be other than the defendant in the execution. For if the defendant in the execution objects to the levy on the ground that the process issued upon a void judgment, or that the particular article of property about to be levied on was exempt by law from execution, he would not thereby bring into dispute the title to the property, nor would a recovery by him on either of these grounds entitle the officer to a judgment in the summary way upon the bond. It has been always held that the acts of Assembly changing the common law mode of proceeding and giving a summary remedy, are to be strictly construed. They are not to be extended beyond the cases expressly provided for, al-

[Cocke vs. Porter.]

though other cases may fall within reasons for which they were enacted.

In the case before us the judgment recites that the plaintiffs in error executed their bond to the defendant in error to indemnify him against any damages and costs he might be put to for selling a horse which he had levied on as the property of Eli Wilson, by virtue of an execution in favor of James Baker against the said Eli Wilson and Henry Wilson; and that it appearing to the court from the records thereof, that Eli Wilson, in said bond named, recovered a judgment against said Agey for selling the property in said bond named, therefore the judgment is rendered in favor of Agey on the bond for the amount of Wilson's recovery against him. This recitation shows that the person claiming the property and recovering the judgment was the defendant in the execution. Whether he recovered because the judgment against him was void, or because the horse was by law exempted from execution, the record does not show; but in either case it is not within the provisions of the act of Assembly by which it is sought to be supported. The party must be left to his common law remedy upon the bond. Let the judgment be reversed.

COCKE vs. PORTER's *Executors*.

1. Where a person has paid money under the pressure of legal process, such payment is not voluntary, the parties not being at the time upon an equal footing.

2. Cocke having a decree against Porter for one thousand seven hundred and eight dollars and ninety-two cents, on the 10th of August, 1831, drew a draft on Porter in favor of Carter for nine hundred and eighteen dollars and forty cents. On the 12th Porter paid one thousand dollars to the clerk; at the same time the clerk, by directions of Cocke's attorney, received the promissory note of a third person for the sum of three hundred and thirty-one dollars and forty-four cents, upon condition that when collected the proceeds should go in discharge of the decree. Carter's agent received this note at the same time upon the condition that when collected the proceeds should go to the discharge of the draft: Held, that the note being paid to Carter, was *pro tanto* a payment of the draft and of the decree; and that Cocke having disregarded the act of his agent in the reception of the note, and having collected the balance of the decree by *fi. fa.* was liable to Porter in assumpsit for the amount thereof.

The facts of the case are fully set forth in the opinion of the court, which was delivered by S. J. W. Lucky, special judge.

[Cocke vs. Porter.]

McKinney, for plaintiff in error.

Hynds, for the defendants in error, cited 2 Starkie, 63 and 66 :
9 Johnson, 201.

Lucky, J. delivered the opinion of the court.

This is an action brought to recover money had and received by the plaintiff in error for the use of Alexander Porter in his life time. The record discloses the following facts:

On the 29th of June, 1831, John Cocke obtained a decree in the supreme court at Jonesborough against Alexander Porter, for the sum of one thousand seven hundred and eight dollars and ninety-two cents, besides costs. Shortly after the decree was obtained an execution was issued by the clerk and placed in the hands of the attorney of Cocke. On the 19th of August, 1831, Cocke transferred a portion of this decree to Alfred M. Carter in these words:

“Mr. Alexander Porter, on sight, pay Alfred M. Carter nine hundred and eighteen dollars and forty cents, which will be in discharge of so much of the judgment I obtained against you in the supreme court at Jonesborough.

JOHN COCKE.

Test, DAVID W. CARTER.

August 19, 1831.”

Afterwards, that is to say, on the 12th of September, 1831, Porter paid to the clerk of the supreme court a thousand dollars in money. At the same time a note on Robert Massingill was received by the clerk with the assent of the attorney of Cocke, for three hundred and thirty-one dollars and forty-four cents, upon the condition that the money when paid upon it should be applied in satisfaction of the decree. When the note was passed to the clerk by the agent of Porter, James P. Taylor, who was the agent of Carter for the draft which he had received on Porter, was likewise present, and agreed at the time to receive the note on the same condition on which it had been taken by the clerk of the supreme court. His endorsement on the back of the draft is in the following words:

“Received on this draft, of John A. M’Kinney, five hundred and twenty dollars and seventy-six cents, and also a note on Robert Massingill to Alexander Porter for three hundred and thirty-one dollars, dated 15th of May, 1828, and due three days after date, which note is received, subject to the same condition on which

[Cocke v. Porter.]

the clerk of the supreme court at Jonesborough received it of Mr. Massingill for Alexander Porter. JAMES P. TAYLOR."

In September, 1831, Cocke sent the execution to Nashville against Porter, refusing to allow the credit for the note, and collected the residue of the decree from Porter, after deducting the payment of the one thousand dollars which had been paid to the clerk. The jury found a verdict for the defendants in error; a new trial was moved for and refused, and the cause is brought to this court by an appeal in the nature of a writ of error.

The question now propounded to the consideration of this court is, whether upon this state of facts the defendants in error, in an action for money had and recovered, are entitled to a recovery from Cocke? The action for money had and received resembles a bill in equity, and whenever the defendant receives money to which the plaintiff is in justice and equity entitled, the law implies a debt and gives this action. 2 Starkie, 64. The action is maintainable whenever the money of one man has without consideration got into the pocket of another. 2 Starkie. These principles are admitted to be unquestionable, but their applicability to the present case is denied; and it has been insisted by the counsel for the plaintiff in error that the payment of the residue of the decree was a voluntary payment on the part of Porter, and that he therefore has no right upon which to support this action. It is difficult to perceive upon what ground it can be said that this was a voluntary payment by Porter. It was coerced from him either by an execution or under the threats of using that process of the law. Where a person has been compelled to pay money under duress or through fear of process, and under such circumstances that the parties are not on an equal footing, the payment cannot be considered voluntary. 2 Starkie on Evidence, 66.

Admitting that the attorney of Cocke had no authority to receive any thing but money in satisfaction of the decree, there can be no question that Carter had authority to receive the note on Massingill under the transfer or order which he held for a portion of the decree, and that his act would be binding both upon Cocke and Porter, having received it with the consent of Porter's agent. When the clerk of the supreme court refused to receive the note on Massingill without the consent of Cocke's attorney, who appears to have acted solely upon the ground that Carter's agent would receive the note, the reception of the note on Mas-

[Cocke vs. Porter.]

Massingill was the act of Carter. Carter received the note absolutely, but upon condition that the money due upon it was not to be credited upon the transfer which he held until it was collected. The condition was for the benefit of Carter, designing to retain the security which he had received from Cocke both upon Porter and the maker of the note. After this reception of the note by Carter, the interest of it was vested in him, and it was utterly impossible for Porter or any other person to have divested him of it. Cocke had no authority to do so, and the payment of the note afterwards went in extinguishment of his order and consequently of Cocke's debt to him. Again: it is said in argument that Porter should have filed his bill in equity and enjoined the collection of the residue of the decree when Cocke refused to recognize the conditional receipt which had been given by the clerk of the supreme court. Supposing him to have done so, we are unable to perceive upon what ground he could have compelled Carter to surrender Massingill's note, unless he had paid him the full amount of his interest in the decree which he had received from Cocke. It would have been impossible for him to have done so on any other principle. Any money which was received by Cocke on his decree, under the circumstances of the case, beyond what was actually due upon it, was money had and received to the use of Alexander Porter, and may be recovered in this action. This does not conflict with the principle which has been referred to, to wit: where one man recovers a judgment against another, and having paid it, he cannot recover the same money back again upon the ground that the judgment is erroneous. Of the correctness of this position there can be no question. Porter not only paid the full amount of this decree, but between three and four hundred dollars over, all of which went to Cocke's use and benefit; and he paid it, too, under such circumstances that to say he should not be permitted to recover it back would be to render the administration of justice a mockery, and no court would resist it unless forced to do so by the most inflexible principles of technical rules. We do not perceive these principles to exist, therefore let the judgment of the circuit court be affirmed.

GILLESPIE and PECK vs. CUNNINGHAM, et als.

1. Grants of land made by the State of Tennessee to which the title of the Cherokee nation had not been extinguished at the time of the grant, are void and convey no title to the grantee.

2. Where it was provided by compact between the United States and the Cherokee tribe of Indians that all land lying within certain calls for certain natural objects should be ceded to the United States, and that commissioners appointed by the United States and by the tribe should run the line, and such commissioners did run the line, and it was subsequently acquiesced in by the parties: Held, that in a conflict of titles arising upon the question of the true location of said boundary, between citizens of the State, the line so run and acquiesced in shall be regarded as the true line.

Nicholas S. Peck and John F. Gillespie, on the 11th day of October, 1833, entered five thousand acres of land in the office of the Hiwassee district. They procured a grant from the State of Tennessee on the 3d of June, 1834. This land lies south and west of the boundary line as run by the commissioners on the part of the United States, accompanied by the commissioners on the part of the Cherokee tribe, and not within the Hiwassee district regarding the said line so run as the true boundary line, but within the Hiwassee district as said Peck and Gillespie believed at the time of the entry, regarding the true line as fixed by the calls for natural objects in the treaty by which the land in said district was ceded to the United States in the year 1819.

After the cession by the Cherokees of all their remaining land within the limits of this State to the United States, and the establishment by the Legislature of the Ocoee district in 1837, to wit, on the 14th of June, 1839, David Cunningham procured grants from the State of Tennessee for a large portion of the land previously granted to Peck and Gillespie. His entries were made in the office of the Ocoee district. Cunningham and others under him took possession of the land covered by his grants, and Peck and Gillespie instituted this action of ejectment in the circuit court of Monroe county, on the 20th of August, 1840, against Cunningham and his tenants. The cause came on and was tried at the July term, 1840, by his honor Ch. F. Keith and a jury of Monroe county. Much proof was introduced by the plaintiffs to show that the land covered by their grant and in the possession of the defendants was ceded to the United States in 1819, and that the line run by the commissioners was not run in conformity with the calls for natural ob-

[Gillespie vs. Cunningham.]

jects made in the treaty of 1819; and by the defendants to show that the parties had acquiesced in the line so run.

His honor charged the jury that if the land covered by the plaintiffs' grant lay within the Hiwassee district their title thereto must prevail; that if on the contrary the Indian title thereto was not extinguished at the time of the entry and the grant founded thereupon, they would be void and convey no title to the plaintiffs; that in ascertaining the fact as to whether the Indian title to said land was extinguished or not at that time, they should ascertain the true time; that if the line was run and marked by commissioners appointed as contemplated in the 5th article of the treaty of 1819, and the parties to the compact sanctioned the act of their agents, the act would be binding upon them; and if Tennessee, for whose use the ceded territory enured, in appropriating the land, conformed to the line so run and marked, it should be regarded as the true boundary though some parts of such line did not correspond with the natural objects called for in the treaty.

The jury rendered a verdict for the defendants. A motion was made for a new trial and overruled. The plaintiffs appealed in error to this court.

Peck, appeared for plaintiffs and argued the case at length, but did not furnish the reporter with his brief.

Vandyke, for defendants, contended, 1. That the plaintiffs in error had no right to introduce testimony to show that the line run by the commissioners, appointed as contemplated by the treaty of 1819, was not run in conformity with the calls in the treaty. The line was run by the agents of the contracting parties, and if they committed errors no one could rectify those errors but the contracting parties; but the contracting parties had ratified the acts of their agents and recognized the line so run as the true boundary of the ceded territory. The United States recognised this line as the true boundary by removing the white settlers beyond it in conformity with her obligation under the 5th article of the treaty. The State of Tennessee has recognised this line as the true boundary by not going beyond it in surveying and sectioning the land ceded to her by the treaty of 1819, and more recently by directing the survey of the land ceded by the treaty of 1835, and by making this line the boundary of such survey. This must there-

[*Gillespie vs. Cunningham.*]

fore be regarded as the true boundary line between the lands ceded in 1819 and 1835. *Parsons vs. Roundtree*, 1 Hay. 378: *Houston's lessee vs. Pillow and Thomas*, 1 Yerger, 481.

2. The land called for in plaintiffs' grant lying south of this line and within the territory reserved by the Cherokee Indians under the treaty of 1819, the grant is void. The grant having issued before the Indian title was extinguished, could confer no title upon the plaintiffs, the State of Tennessee not being at that time the owner of the land. *M'Lemore vs. Wright*, 2 Yerger, 326: *Polk's lessee vs. Wendell*, 5 Wheaton, 303.

TURLEY, J. delivered the opinion of the court.

Certain articles of convention between the government of the United States and the Cherokee nation of Indians were concluded and signed at the city of Washington on the 27th day of February, in the year 1819, by the first of which the Cherokee nation ceded to the United States all of their land north and east of the following line, viz: beginning on the Tennessee river at the point where the Cherokee boundary with Madison county, in the Alabama territory, joins the same; thence along the main channel of said river to the mouth of the Hiwassee; thence along its main channel to the first hill which closes in on said river, about two miles above Hiwassee Old Town; thence along the ridge which divides the waters of the Hiwassee and the Tellico to the Tennessee river at Tallassee; thence along the main channel to the junction of the Cowee and Nanteyalee; thence along the ridge in the fork of said river to the top of the Blue Ridge; thence along the Blue Ridge to the Unicoy turnpike road; thence by a straight line to the nearest main source of the Chestatee; thence along its main channel to the Chatahoochie, and thence to the Creek boundary.

By the fifth article of said convention provision is made that the boundary lines necessary to designate the land thus ceded shall be run by a commissioner or commissioners to be appointed by the United States, who shall be accompanied by such commissioners as the Cherokees may appoint, and that all white people who had intruded or might thereafter intrude on the land reserved for the Cherokees shall be removed by the United States. These lines, so far as it was considered necessary, were run in pursuance of said fifth article of the convention.

[Gillespie vs. Cunningham.]

The Legislature of the State of Tennessee, by act of 1819, ch. 59, (2 Hay. and Cobbs, 139,) laid off the tract of country thus ceded by the Cherokee nation to the United States into a surveyor's district, to be called the "Hiwassee District," and appointed a surveyor general with power and authority to engage a sufficient number of skilful surveyors to run out and survey the land acquired by this treaty from the Cherokee Indians, lying between the Hiwassee, Big Tennessee and Little Tennessee rivers, and north of the Little Tennessee, to which the Indian title had been extinguished preparatory to a sale of the same by the State. In January, 1830, the Legislature of the State passed an act, by virtue of which any person or persons wishing were authorized to appropriate any vacant land in the Hiwassee district which had not been surveyed and sectioned under the provisions of the above-mentioned act of 1819, in quantities not exceeding five thousand acres. Session Acts of 1829, ch. 85, p. 114. Under the provisions of this Act the plaintiffs in error, Nicholas S. Peck and John F. Gillespie, did, on the 11th day of October, 1833, enter five thousand acres of land, upon which they procured a grant from the State on the 3d day of June, 1834. This land lies south and west of the boundary line as run by the commissioners of the United States, accompanied by the commissioners of the Cherokee nation, from the point on the Hiwassee river, two miles above Hiwassee Old Town, where the first hill closes in with the river, to the Tennessee river at Tallassee. In the year 1835 a further convention was concluded between the government of the United States and the Cherokee Indians, by which they ceded all their land within the limits of the State of Tennessee to the United States. For the purpose of disposing of this land the Ocoee district was established by the Legislature in November, 1837, intended to embrace all the land ceded by the convention of 1835, and which lay south and west of that ceded by the convention of 1819. The defendants, under the Act of 1837, entered and procured grants from the State in 1839 for the premises in dispute, and which are covered by the grant for five thousand acres issued to the plaintiffs on the 3d day of June, 1834, and the question now is which of them is the better title.

The State of Tennessee exercises the power of perfecting titles to land within her borders by virtue of the compact made with North Carolina in 1804. This compact was recognized and con-

[Gillespie vs. Cunningham.]

affirmed by the Congress of the United States in 1806, but the power given by it was restricted to land north and east of what has since been called "the Congressional Reservation line," and to which the Indian title should be extinguished; for it is expressly provided in the Act that "nothing herein contained shall be construed so as to affect the Indian title." Under this compact, thus limited by Act of Congress, the State of Tennessee has never claimed or possessed the power to appropriate land to which the Indian title had not been extinguished, and entries and grants for that purpose, whether made by accident or design, have invariably been held to be void and to convey no title whatever. Then the point upon which the conflicting rights of the parties to this suit turns, is the period of time at which the Indian title to the premises in dispute was extinguished, viz: whether by the convention of 1819 or 1835? If by that of 1819, the land belongs to the plaintiffs; if by that of 1835, to the defendants. That the land is not embraced within the lines as run by the commissioners under the convention of 1819 is not denied, but admitted. But then it is contended that the line from the first hill which closes in on the Hiwassee river, about two miles above Hiwassee Old Town, to Tallassee, on the Tennessee river, is run too far north; that if it had been run as it should, according to the calls for natural objects made in the treaty, it would have been far enough south to have included the disputed premises. Whether this portion of the line be correctly run or not, we do not deem worthy of consideration; it is sufficient that it was run by the contracting parties; that they were satisfied with it, and have acquiesced in it. The State of Tennessee had no right to complain; the extinguishment of the Indian title was an act of gratuity on the part of the general government, for it is expressly provided in the before mentioned cession Act of 1806, that "nothing herein contained shall be so construed as to subject the United States to the expense of the extinguishment of the Indian title." The State of Tennessee and her citizens are bound by the lines as run under the convention of 1819, and the consequence is that the Indian title to the land in dispute was not extinguished until the convention of 1835, and that the entry and grant under which the plaintiffs claim are void and convey to them no title. The judgment of the court below in favor of the defendants, will therefore be affirmed.

POWERS vs. HURST.

Evans was elected in March, 1836, register for Claiborne county, and died in 1837. Hurst was appointed on the 4th of April, 1837, to fill the vacancy. On the 3d of March, 1838, he was elected register by the qualified voters of the county, the first election for county officers being held on that day: Held, that Hurst was constitutionally elected and in office for four years from the date of said election.

George Powers filed his petition in the Circuit Court of Claiborne county on the 14th of May, 1840, setting forth that he was duly and constitutionally elected register of said county by the qualified voters thereof; that he had taken the oath required by law, and given bond and security for the performance of the duties of the office; that he had applied to the former register, Hurst, for the books and papers belonging to the office, and that Hurst refusing to give them up, he had procured an order from the county court for the delivery of them, and that said Hurst had disregarded the order. The petitioner prayed that a mandamus issue. Hurst answered and stated that on the 4th day of April, 1837, he was appointed by the justices of Claiborne county to fill a vacancy in the office of register, occasioned by the death of Evans, the first register, elected in 1836, and that at the first election for county officers thereafter occurring, to wit, on the 3d day of March, 1838, he was duly and constitutionally elected register of the county for and during the term of four years from the date of said election, and that he took the oath of office, gave bond, &c., and therefore claimed to be the lawful register for the term of four years from the 3d of March, 1838.

The cause came on to be heard at the May term, 1840, of the Claiborne circuit court, and the facts set forth in the answer being admitted to be true, the court (the honorable R. M. Anderson presiding) dismissed the petition of Powers. Powers appealed in error to this court.

Peck, for petitioner.

J. A. McKinney, for defendant.

GREEN, J. delivered the opinion of the court.

At the first election of county officers in Claiborne county under the amended constitution, Walter Evans was elected register

[Powers vs. Hurst.]

of that county. In 1837 he died, and the vacancy was filled by the justices of said county on the 4th day of April, 1837, by the temporary appointment of the defendant, Hiram Hurst, to that office. On the 3d day of March, 1838, at the expiration of two years from the time of the first election, an election was held in said county to fill the vacancy occasioned by the expiration of the term of service of the sheriff and trustee; and an election was also held at the same time for register of the county, and the defendant was duly elected by the qualified voters thereof to that office. The defendant entered into bond, conditioned to discharge the duties of register faithfully for the next four years, and was qualified accordingly. At the time of the election of county officers in March, 1840, an election was held for register of said county, and the plaintiff, George Powers, was elected, gave bond and security, and was qualified as such officer. The plaintiff applied for the books and records belonging to said office, but the defendant refused to give them up, alleging that the time for which he had been elected being unexpired, he was still lawfully and constitutionally the register of Claiborne county. To obtain the said records, and to be let into the said office, this petition for a mandamus was filed. The circuit court, on consideration, dismissed the petition, and the plaintiff appealed in error to this court. The only question now for consideration is, was the election for register in March, 1838, constitutional? or should the temporary appointment of the justices have continued until March, 1840, the end of the time for which Evans had been elected? The constitution, art. 7, sec. 1, provides that "there shall be elected in each county, by the qualified voters therein, one sheriff, one trustee and one register; the sheriff and trustee for two years and the register for four years." In the 2d section it is provided that "should a vacancy occur subsequent to the election in the office of sheriff, trustee, or register, it shall be filled by the justices; if in that of clerk, to be elected by the people, it shall be filled by the court, and the person so appointed shall continue in office until his successor shall be elected and qualified; and such office shall be filled by the qualified voters at the first election for any of the county officers." From these provisions it appears that these county officers are to be elected by the people of the county. They are constituted the general appointing power. Should a vacancy occur, it is to be filled by the justices. But this is only a temporary

[Powers vs. Hurst.]

appointment; and the office is to be filled by an election by the people "at the first election for any of the county officers."

Two prominent objects are manifest in these provisions. In the first place that the officers should hold their offices at the will and by the voice of the people; and secondly, that the public tranquility should not be unnecessarily disturbed by causing the people to assemble for the appointment of a single officer, whenever by death, resignation or removal, any one of these offices might become vacant. Had the people been called on to fill these vacancies whenever they might occur, the popular assemblages would have been so frequent as to be exceedingly inconvenient, and the excitement attendant on elections demoralizing in their character, would have been a very great evil. Therefore the justices, who assemble at their county courts every month, are charged with the duty of filling these vacancies for the time being. But as it was thought desirable that these officers should be elected by the people, there was no reason that the appointee of the justices should hold his appointment longer than until the next election for county officers. At that time the people must assemble for the election of those officers whose period of service may have expired; and they could as conveniently elect an additional officer as to elect those for whom they were called together to vote. Hence the constitution very properly provides that "such office shall be filled by the qualified voters at the first election for any of the county officers."

The language of this provision is explicit, and in order to show that the temporary appointment should be made by the justices for the remainder of the unexpired term of the predecessor, a clear and manifest intention of the convention should be made to appear. But no such intention seems to have existed. To preserve uniformity in the appointment at the same time of officers of the same grade throughout the State, would be a matter of small moment and of no practical utility. But if it were a matter of greater importance than it is supposed to be, it would be unattainable. New counties have been admitted and will continue to be constituted; the organization of which, by the election of county officers, would necessarily mar the supposed beauty and harmony which would result from preserving the terms of office entire; while on the other hand the people would be kept for a great length of time from the exercise of the appointing power which it

[Grace vs. Hale.]

was thought important for them to retain. Upon the whole, we are satisfied that the words of the constitution in providing that an office where there has been a temporary appointment by the justices "shall be filled by the qualified voters at the first election for any of the county officers," express the meaning of the framers of that instrument, and therefore that the election for the defendant, Hurst, in March, 1838, was regular, and consequently that his term of office will not expire until March, 1842. Let the judgment be affirmed.

GRACE vs. HALE.

1. If an infant sell or exchange his personal property, he may at any time disaffirm the sale or exchange and sue for and recover the value of his property so sold or exchanged, and this is so, though the minor by such sale or exchange procured necessities.

2. Where the son, a minor, lived upon the land of his father and was permitted by the father to cultivate twenty acres of his land for his own benefit: Held, that a horse was not a necessary within the meaning of the law for the purchase of which he would be bound.

3. Where an infant exchanged horses and did not return the horse procured in the exchange: Held, in an action for the recovery of the value of the horse by him exchanged, the jury had no right to make an equitable adjustment between the minor and the defendant, but that the minor was entitled to the full value of his property.

Nathan Hale, by his next friend, instituted an action of trover in the circuit court of Greene county in June, 1839, against William Grace to recover the value of a horse.

The defendant pleaded not guilty. It appeared from the proof submitted to the jury that Hale was an infant and that his father permitted him to possess and cultivate, for his own benefit, about twenty acres of land, jointly with one Rutledge, and that they commenced the crop accordingly; that the plaintiff had a horse which his father had furnished but which was not fit to use in tilling the farm, and that he exchanged horses with the defendant with the view of getting a good work-horse. It also appeared that the defendant had got much the best horse in the exchange, and that the plaintiff requested him to dissolve the contract and

[Grace vs. Hale.]

proposed that each should restore to the other his property; this defendant refused; and thereupon this action was instituted.

Judge Powell charged the jury that if the plaintiff was a minor his contract of exchange was voidable at his election; that the question whether the horse procured was or was not "a necessary" in the meaning of the law was a question of law for the court to determine; that a horse was not in this case to be regarded as "a necessary," and that the plaintiff, if entitled to recover at all, was entitled to the whole value of his horse, and that the jury had no right to make any equitable adjustment between the plaintiff and defendant. The jury rendered a verdict of fifty-three dollars in favor of the plaintiff; a motion was made to set it aside and refused. The defendant appealed in error to this court.

R. J. McKinney, for the plaintiff in error, insisted, 1. That considering the circumstances and condition of the defendant, a horse was necessary and proper for him. Chitty on Con. 31: Strange's Rep. 1101: Comyn on Con. 154-6: Bur. Rep. 1719, 1801-02: 8 Term Rep. 578: Bul. M. P. 154: 3 Jac. Law Dic. 424.

2. It is contended that the question of necessities is a question of fact for the decision of the jury. 2 Stark. Ev. 405: 3 Jac. Law Dic. 428: Chitty on Con. 34: 8 Term Rep. 578: 1 Stark. Ev. 377, 400.

3. It is submitted that the defendant having delivered the horse in exchange to the plaintiff, cannot now recover him back. 4 Eng. Com. Law Rep. 189: 2 Stark. E. 406.

T. D. Arnold, contended that a horse was not "a necessary" within the meaning of the term as used in the adjudicated cases. It might be regarded indispensable to have a horse to carry on agricultural operations, but the law did not regard infants as competent to conduct a farm or other branch of business. If he could bind himself for a horse as being necessary to carry on a farm, then upon the same principle he could bind himself for any other piece of property which might be regarded as necessary in the opinions of men for the successful conducting of the farm. Why not permit infants to embark most extensively in any branch of business, agricultural, commercial or manufacturing, and authorize them to purchase and hold them responsible for any implement of trade, machinery, goods and wares which they might purchase

[Grace vs. Hale.]

upon the ground that they were "necessaries" within the meaning of the law? He contended such a course of decision would break down all the wise and safe limitations which the common law for the security of infants had imposed upon their ability to contract. Necessaries consisted of diet, clothing, washing, lodging, schooling and medicine. These, infants had a right to bind themselves for; and any extension of the range of their contracting power, was calculated to jeopardise the rights and interests of those who were unable to protect themselves. What were necessaries it was proper for the court to determine and not the jury.

RENSH, J. delivered the opinion of the court.

This is an action to recover the value of a horse owned by the plaintiff and given by him, he being a minor, to the defendant in exchange for another. Plaintiff lived with his father and was maintained by him, but being permitted to cultivate, for his own benefit, a portion of his father's land, it is contended that a horse proper for agricultural operations became, under the circumstances, necessary for the infant, and that his contract for exchange will bind him.

The supposed error in the judgment below, which was in favor of the infant, hence mostly insisted on, is that the court charged the jury that the question whether necessaries or not is one exclusively for the court, with which the jury have nothing to do; and in the sense in which this was said by the court it is certainly correct. It is matter of law that the necessaries for which an infant may bind himself by contract, consists of diet, apparel, washing, lodging, schooling and medicine; but whether within these limits certain articles were in fact necessary and to what extent, becomes, in the language of Lord Kenyon, (1 Esp. 212,) a relative fact to be governed by the fortune and circumstances of the infant. 8 T. R. 578. But it seems to us that this question did not here arise. The question here is not for what necessaries and to what extent an infant may make himself liable, but whether an infant can sell or exchange his property?

It has been held that if an infant sell goods the sale is void, and if the vendor takes them trespass will lie; but if the infant deliver them with his own hands that form of action will not lie, but he may avoid the contract of sale. 1 Mod. 137. So it has been held //

[Wilson vs. Frazier.]

in this country, that an infant having sold personal property may at full age disaffirm the sale and reclaim the property. *Williams vs. Morris*, 2 Bibb, 107. But it is said that the contract of sale or exchange in this case is rendered valid, because the horse was, under the circumstances, necessary for the infant. But it has been ruled that if an infant become a shop-keeper and buy goods and wares for the use of his shop, the contract does not bind him. 1 Rol. 729: 2 Cro. 494. If he borrow money, though he afterwards employ it for necessaries, he is not liable to the vendor, 1 Rol. 279, or even if it were lent to him for the purpose of procuring necessaries, for the lender ought to provide them. 1 Rol. 386-7. The sale or exchange therefore, by parity of reasoning, would not be rendered valid merely because the thing obtained thereby might be necessary. But we are of opinion, also, that in this case the horse procured was not a necessary within the meaning of the law; we are also of opinion that the court did not err in holding that in such an action the plaintiff was entitled to recover the value of the property, and that the jury ought not to take upon themselves to make an equitable adjustment between the parties. Let the judgment be affirmed.

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WILSON vs. FRAZIER and M'KINNEY.

1. Letters of administration granted in a county in which the deceased did not reside at the time of his death, are void.
2. The widow is not the next of kin to her deceased husband.
3. Letters of administration are not void because another may have a superior title to them by law.
4. The circuit court has no power to repeal letters of administration granted by the county court, unless the party seeking the repeal of them had appeared in the county court and contested the grant. The proceeding to repeal the grant must originate in the county court.

This cause was brought by appeal in the nature of a writ of error from the circuit court of Grainger county. The facts of the case are sufficiently set forth in the opinion of the court.

Peck, for plaintiff in error.

[Wilson vs. Frazier.]

J. A. McKinney, for defendants in error.

REESE, J. delivered the opinion of the court.

William M. Wilson in December, 1839, died in the territory of Florida. The county of Grainger in this State was the county of his residence and domicil. On the first Monday in January, 1840, the county court of Grainger granted letters of administration on his estate to Frazier and M'Kinney. They are not the next of kin of the deceased, but claim to be his largest creditors. About the same time the county court of Jefferson granted letters of administration on the estate of the said William H. Wilson to his widow and relict Mary A. Wilson, the plaintiff. She thereupon filed in the circuit court of Grainger county, her petition praying that a writ of *certiorari* might issue to the county court of Grainger, to the end that the proceedings of said court in granting letters of administration to Frazier and M'Kinney, might be certified to said circuit court, and that said letters might be there repealed; and also praying for a writ of *supersedeas* to issue. These writs were issued; but a rule having been granted in the circuit court to show cause why these writs should not be dismissed, the said rule was, on argument, made absolute, and they were dismissed, and from that judgment the plaintiff has prosecuted her appeal to this court.

The letters of administration granted to the plaintiff by the county court of Jefferson, which was not the county of decedent's residence and domicil, are void. This point has been repeatedly so decided by this court. But it is said if this be so, still the plaintiff's right to the administration is superior to that of the defendants's, and that she may, therefore, in this mode, cause these letters to be repealed. The statute of Henry VIII. gives, indeed, to the ordinary the power to confer the administration, at his discretion, upon the widow or the next of kin, or upon both. Our statute of 1715, gives the right of administration to the next of kin, and is silent as to the widow. The wife as such is not the next of kin. Whether her right to the administration, although not secured by the act of 1715, can be successfully maintained as existing here by the operation of the statute of Henry VIII. it is not necessary, perhaps not proper, that we should now decide. Unquestionably it has been very much the custom to grant to widows administration on the estates of their deceased husbands. But

[Hale vs. Landrum.]

however the question may be settled, and it is not without its difficulties, we have said it is not necessary now to decide it. For most clearly the letters of administration granted to the defendants, could not be held to be void merely on the ground that another might have a superior right to the administration. This is well settled. And it is equally clear that the circuit court could not for such a reason repeal the letters in the mode in this case attempted.

There must be a dispute and contest on the subject in the court of probate to confer on the circuit court jurisdiction over the matter by appeal or *certiorari*. If when the grant of administration was made to the defendants by the county court, the plaintiff had presented her claim, she could have taken her case to the circuit court by appeal or *certiorari*, according to the circumstances. Not having done so, the proceeding to repeal the letters once granted must originate in the county court. Without this the circuit court has no jurisdiction over the matter. For this reason we affirm the judgment.

HALE vs. LANDRUM.

An allegation in a petition for writs of *certiorari* and *supersedeas* that the petitioner could not give the security required by law is a sufficient reason why the petitioner did not appeal to authorize the granting of the writs.

Hale recovered a judgment against Landrum for the sum of seven dollars before a justice of the peace for Greene county, on the 28th of January, 1832. From this judgment no appeal was prayed or granted. On the 10th of February, 1832, Landrum presented his petition to two justices of the peace praying writs of *certiorari* and *supersedeas*, in which he stated that he did not owe the plaintiff, Hale, any thing, and that he did not appeal from the judgment because he was unable to give the security required by law before obtaining such appeal. The writs were granted and the cause brought up to the circuit court. The plaintiff moved the dismissal of the petition, which motion was overruled. A trial was had before a jury and a verdict rendered in favor of the defendant.

[Hale vs. Landrum.]

A motion for a new trial was made and overruled. The plaintiff appealed in error to this court.

R. J. McKinney, for plaintiff in error.

J. A. McKinney, for defendant in error.

RESE, J. delivered the opinion of the court.

It is well settled that to sustain a petition for a *certiorari*, a satisfactory reason must be given why the petitioner did not appeal. Is the statement, that at the time he was unable to give security, a legal and adequate reason? It is contended on behalf of the plaintiff in error, not to be, because, first, the degree of effort or diligence used to obtain security is not stated. In applications for continuances, in motions for new trials and other like cases, a specific statement is often necessary to show the absence of *laches* and the use of diligence. But in this case it is necessary only to state a sufficient reason for omitting to appeal. The party states that at the time he was unable to give security; if he had gone on to state that he used great pains to give the security and failed, it might have served to verify the statement, but it would not have changed the nature of the reason given for not appealing. It is said, further, that the causes producing this inability ought to have been stated, because if the inability to give security resulted from the poverty of the petitioner he might have appealed *in forma pauperis*. But an affidavit before the magistrate that on account of his poverty he was unable to give the security, would not have entitled him to the appeal *in forma pauperis*; he must have sworn that owing to his poverty he was unable to bear the expenses of the suit. Moreover it merits a doubt whether the remedy by appeal is so to be favored, and that by *certiorari* so to be repelled as to require even in a case where a party could safely and conscientiously take the oath of a pauper that he should do so at the time of trial or lose his right to a *certiorari*. To sue *in forma pauperis* is itself an extraordinary mode, not to be resorted to if the party can give the security required by law in general, or until he fully ascertains that he cannot. The only ground on which the extension of the jurisdiction of a justice of the peace has been sustained is that the party may appeal to court and have a jury trial. That jurisdiction has now been extended in this State to two hundred dollars in some cases, an amount rendering the giving of the security requir-

[Jobe vs. O'Brien.]

ed by law not a little difficult in many instances. To hold that inability to give the security required at the trial constitutes no good ground for a *certiorari* would be to make the present extended jurisdiction of justices of the peace very seriously to impair the right of jury trial, and to weaken greatly the not very satisfactory reason by which such extension of jurisdiction has been uniformly vindicated. Upon the whole we affirm the judgment of the circuit court.

JOHN JOBE vs. JAMES O'BRIEN, *et als.*

1. Where three persons purchase three several tracts of land of the same individual but by separate contracts, upon which the lien of an execution had previously attached and two of the tracts were subsequently sold to satisfy the execution, the persons whose lands are sold have not a right to compel him whose land was not sold to contribute to re-imburse their loss.

2. The principle of contribution grows out of joint undertakings and does not apply to cases like the present.

3. Where the sale of land is by deed and without fraud or warranty, the vendee has no claim upon the vendor for money expended in discharging incumbrances upon the lands purchased.

4. The purchaser of land is chargeable with notice of the lien of an unsatisfied judgment in the county in which such land is situated.

John Jobe filed this bill in the circuit court of Carter county on the 20th March, 1835, against the defendants, Christian Carriger, John and James O'Brien, and against George Lacy. It was subsequently transferred to the chancery court at Jonesboro, and at the November term, 1839, the Hon. Thomas L. Williams, chancellor, dismissed the bill and ordered that complainant pay the costs. From this decree complainant appealed to this court.

John A. McKinney, for complainant.

Robert J. McKinney, for defendants.

GREEN, J. delivered the opinion of the court.

In this case the complainant purchased a tract of land of seventy-five acres, from George Lacy for the price of five dollars per acre

[Jobe vs. O'Brien.]

and paid him therefor, and took a deed. The defendants O'Brien also purchased a tract of land from said Lacy, and the defendant C. Carriger purchased another. A judgment was obtained by one Gott against Lacy, which was a lien on all these tracts of land; and an execution issued thereon, and was levied on them all. The sheriff sold the tract purchased by Carriger, and the one purchased by the complainant, and these satisfying the execution, the tract purchased by O'Brien was not sold. At the sale of the complainant's tract, O'Brien became the purchaser for two hundred dollars. This sum, by agreement with O'Brien, was paid by complainant, and O'Brien relinquished his title under the execution sale to the complainant.

A part of the purchase money (about two hundred dollars) payable in trade, which O'Brien agreed to pay Lacy for the tract of land purchased by him, remained unpaid at the time of the sale of the aforesaid lands by the sheriff, and yet remain in the hands of O'Brien.

Upon this state of facts it is insisted, first, that O'Brien shall contribute part of the amount of the aforesaid execution, in proportion to the value of the land he purchased of Lacy, because his land was equally liable to the satisfaction thereof as that of the complainant.

We think this proposition cannot be sustained by any principle known to a court of chancery. It has no analogy to the case of different persons who are equally bound as sureties or otherwise to pay a debt, which is discharged by one of the parties. In such case, the others would be bound to contribute. But here, a judgment existed against Lacy which was a lien on all his lands. While thus encumbered, different persons chose to make a purchase of different tracts of land. They have no connection with each other. The creditor may levy on and sell any one of the tracts he may choose. The party who had purchased such tract from the debtor, certainly has no claim that others shall contribute to reimburse his purchase money, because another person has a better right to the land than he has, merely on the ground that had the creditor chose he could have placed either of them in the same predicament. If this principle were adopted, it would lead to endless confusion. An execution is in the hands of the sheriff, and the debtor, by private sale, disposes of his personal estate; negroes, horses, cattle, waggons, ploughs, go into the hands of various persons. The execution is then levied on a negro that had been purchased of the debtor, and he is sold to satisfy the debt.

[Jobe vs. O'Brien.]

Any one of the negroes, horses, or waggons, might have been taken at the election of the creditor; and if for that reason equity requires all these persons to contribute, to reimburse the loss which he has sustained whose negro had been sold, what a scene of litigation we should have in bringing these hundred persons before the court to contribute their rateable proportions. But the principle of contribution grows out of the joint undertaking of the parties. It can have no application in such a case as the one before the court.

2. It is next insisted that the amount due Lacy from O'Brien, and now in his hands, shall be decreed to the complainant. The character of the deed from Lacy to the complainant, does not appear in this record. If there is no warranty in the deed, nor misrepresentation on the part of Lacy, we do not perceive upon what principle he would be bound to reimburse the complainant any monies which may have been laid out in securing the title to his land. And if Lacy is not liable to the complainant, it is unnecessary to consider the question, whether the complainant can stand in the place of the judgment creditor, by whose execution the land was sold, so as to enable him to set up, as a judgment creditor of Lacy, a right to the monies in the hands of O'Brien. But this would be carrying the doctrine of subrogation further than we are aware it has ever yet been done.

Upon the whole, we are of opinion the complainant is not entitled to relief in either aspect of this case, and therefore affirm the decree.

At a subsequent day of the term, Mr. John A. McKinney with permission of the court urged some additional considerations upon the court with much zeal in favor of the complainant. Mr. Justice Green then delivered the following supplemental opinion.

The ground assumed is fully met in the opinion. It states that where there is neither warranty nor fraud, it is not seen on what ground there exists any liability to Jobe. The case supposed, of a previous sale, and receipt of the consideration, and *that concealed* from Jobe, would be a case of gross fraud. Had such a case been stated in the bill, the court would have taken a very different view of it. In this case, Gott's judgment was matter of record, of the existence of which Jobe was bound to be informed.

There is no allegation that there was any representation by the

[Tyler vs. The State.]

vendor, that the land was free from incumbrances. Indeed, from aught that appears, he may have sold to Jobe with the knowledge of the incumbrance by both, and the understanding that Jobe was to discharge it.

TYLER vs. THE STATE.

1. An indictment for obtaining goods by false pretences, must contain an absolute negative of the truth of the pretences employed.

2. An order in the following words "Messrs. G. and L. please let the bearer E. Tyler, have five dollars in goods on my account. R. H. L." is negated with sufficient certainty by an averment in the following words: "Whereas the said R. H. L. never did write, or send, or cause to be written or sent any such letter to the said Gains and Luttrell, or to any one else to let the bearer have any amount in the store whatever."

3. In an indictment for obtaining goods by means of a forged order, it is not necessary that the person who purports to be the drawer of the forged order should have an interest in the goods obtained.

Swan, for plaintiff in error.

Attorney General, for the State.

GREEN, J. delivered the opinion of the court.

The plaintiff in error was convicted in the Knox circuit court upon an indictment founded on the act of 1729, ch. 34, sec. 50, for obtaining goods by false pretences. The indictment alleges that the defendant presented to Luttrell and Gains a false and counterfeit letter, purporting to be written by Robert H. Luttrell, which is in the following words:

"Messrs. Gains and Luttrell, at Knoxville, please to let the bearer, E. Tyler, have five dollars in goods on my account. September 28, 1839. Yours, ROBERT H. LUTTRELL."

By means of said letter the said Tyler obtained from the said Luttrell and Gains, two silk handkerchiefs worth two dollars, six yards of calico of the value of one dollar, and other goods to the value of two dollars, which goods were delivered upon the faith and credit of said letter to the said Tyler, "whereas in truth and in fact the said Robert H. Luttrell, never did write or send, or cause

[Tyler vs. The State:]

to be written or sent any such letter to said Luttrell and Gains or any one else, to let the bearer have any amount in the store whatever."

There are three counts in the indictment containing substantially the same statement, except that in the first count the goods are charged as being the property of Mathew M. Gains; in the second count as the property of Mathew M. Gains and James C. Luttrell, and in the third count as the property of Mathew M. Gains, James C. Luttrell and Robert H. Luttrell.

A motion was made in arrest of judgment but the motion was overruled and judgment rendered upon the verdict. It is now insisted for the plaintiff in error that the court erred: first, because it is insisted the indictment does not sufficiently negative the truth of the pretences employed by the defendant. It is certainly an indispensable requisite of an indictment of this character, that there must be an absolute negative of the truth of the pretences employed. 3 Chit. Crim. Law, 180. But we think such a negative is contained in this indictment. The only pretence charged in the indictment to have been employed, was the letter which purported to have been written by Robert H. Luttrell. Having set out the letter the indictment avers "that the said Robert H. Luttrell never did write or send, or cause to be written or sent any such letter to the said Gains and Luttrell or to any one else to let the bearer have any amount in the store whatever;" although the idea intended to be conveyed is not very happily expressed in this averment, yet it contained a distinct negative that the letter which had been set out, was written and sent by Robert H. Luttrell. If Robert H. Luttrell never wrote or sent, or caused to be written or sent any such letter as the one copied in the indictment, how could it be true that he wrote and sent the identical letter by virtue of which the goods were obtained? It could not be; for having done the act spoken of, it could not be said that he had not done such an act.

2. It is next insisted that as this is a forged order for goods, in which the party who purports to be the drawer of the order had no interest, this indictment cannot be sustained upon the statute; and the authority of the case of *Walton vs. the State*, 6 Yerg. 377, is relied on. In that case the indictment was for forgery founded on the 40th section of the statute. Had Walton succeeded in obtaining the watch, it was admitted by his counsel (page 383) that

[Boyd vs. The State.]

he would have been guilty of the offence punishable by section 50. The two sections are entirely different, and provided for different cases. Section 40, defines forgery and prescribes its punishment. This offence is complete, whether any third person be actually injured thereby or not; but in the case before us, there would be no crime unless some one receive a prejudice from the act. 2 Russell on Crimes, 350. In Walton's case, the indictment was for forging the paper. The watch was not obtained; no person was injured. Here the indictment is for fraudulently, by means of the forged order, obtaining the goods of Gains and Luttrell. The counterfeit letter was only a means by which he was enabled to commit the crime. Any other false token would have made the act of fraudulently getting the goods equally criminal. Let the judgment be affirmed.

BOYD vs. THE STATE.

1. An indictment under the Act of 1803, ch. 9, sec. 2, must charge that the disfigurement of the beast was done maliciously.

2. Cutting off the hair of the tail of a horse or his mane, if done maliciously and of purpose is within the statute and indictable as malicious mischief.

3. Where a confession is obtained by a promise to put an end to a prosecution, such confession is inadmissible as evidence.

4. Where the proof is direct and manifest that a confession is obtained by the hope of advantage to be obtained by the making of such confession, and the court left it to the jury to say whether under all the circumstances the confession was improperly obtained, telling the jury that if they believed that the confession was induced by a promise they ought to disregard it: Held, that such charge was erroneous; it was the province and duty of the court to have excluded such testimony.

J. A. McKinney, for Boyd.

Attorney General, for the State.

REESE, J. delivered the opinion of the court.

This is an indictment under the act of 1803, ch. 9, for the malicious disfigurement of a horse. The indictment contains four counts. Of the second count, charging a disfigurement of the horse by cutting off his tail, the defendant was acquitted by the verdict.

[Boyd *vs.* The State.]

Of the other three counts upon which a conviction has taken place, we are of opinion that the first and third are not good, because not alledging the act in question to have been done maliciously, (see *The State vs. Wilcox*, 3 Yer. 378.) The fourth count charges, that the defendant and one William Depew did unlawfully, maliciously and of purpose, disfigure a gelding, the horse beast of Benjamin Birdwell, of the value of one hundred dollars, by then and there, &c. cutting off the tail of said horse beast, and by then and there cutting off the mane of said horse beast, &c. For the defendant it is urged, that the act charged does not fall within the meaning and mischief of the statute of 1803, ch. 9. We take it that the act in question falls within both. Mutilation by dismemberment, is prohibited, in cutting off the ear, tail or tongue, putting out an eye or otherwise, and wounding and killing are prohibited by the statute. The words "to disfigure" seem to operate to describe such an act as that charged; and are unnecessary and unmeaning in the statute if not applied. If all the hair belonging to the mane and tail of a horse be shaved off, it may be that we would not speak of him as having been dismembered, but all the world would say that he was much disfigured. It is the very term which would be used, and maliciously to impair the use and value of a horse, by injuring his appearance and marring his beauty in removing of those parts alike ornamental and useful, falls entirely within the mischief which the act seeks to prevent. We are of opinion, therefore, that the reasons in arrest of judgment were properly overruled.

The bill of exceptions shows that one of the witnesses for the State, at whose house the act charged in the indictment took place, testified that after the defendant and Depew were arrested, he said to them that if they would acknowledge that they did it in a frolic and from no disrespect to his family, he would forgive them and use his endeavours to get Birdwell to drop the prosecution. Depew then said "we have done it out of a frolic, and Boyd, the defendant, "that it was not done out of any harm, or with any view to disgrace witness's family."

This testimony, which was objected to, ought clearly to have been rejected. But the court did not reject it, but left it to the Jury to say whether under all the circumstances the confession had been improperly obtained, telling the Jury that if they believed that the confession was induced by a promise that it should be better for the

[Peck vs. Bullard.]

defendant, they ought to reject it. It was the duty and province of the court in this case to have excluded the evidence of confession. The proof was direct and manifest that the confession was obtained by a promise that witness should attempt to put an end to the prosecution. In this we think there was error, and for this we reverse the judgment and award a new trial.

PECK vs. BULLARD.

Where a bill was filed by vendor of land after the lapse of nine years from the date of the conveyance, to rescind such contract on the ground of misrepresentation of the quantity and quality of the land by the vendee: Held, that the complainant was not entitled to relief though the bill was filed within seven years after the discovery of the fraud, there having been no misrepresentation of any facts by which the complainant could have been prevented from obtaining a full knowledge of his rights at any moment of time.

Jacob Peck filed this bill in the Chancery Court of Tazewell, in Claiborne county, against William Bullard, for the purpose of rescinding a deed of conveyance of two tracts of land.

Complainant in the year 1827, (at what precise time does not appear,) being in want of a horse, and having a large quantity of wild, uncultivated and second rate land in the county of Claiborne, requested and authorised his brother Adam Peck to sell a portion of his land and procure him a horse therewith. Adam Peck proceeded from the county of Jefferson to the county of Claiborne, and to the residence of defendant Bullard. The land in controversy lay in the vicinity of Bullard's. Peck proposed to sell, and did sell by metes and bounds to Bullard two tracts of land, one supposed to contain fifteen acres, the other one hundred and fifty acres, for a horse of the value of \$75. The land was not surveyed with a view to ascertain the exact quantity which lay within the boundaries, nor does it appear that there was much concern about the exact quantity sold.

The complainant was the owner of much wild land, subject to annual taxes and not advancing in value, and seemed desirous to get clear of some of it. Some time after this sale, to wit: on the 23d day of November, 1827, Bullard called on Peck for the purpose of getting a deed to the premises in controversy. In the mean

[Peck vs. Bullard.]

time Peck had been informed that Bullard had "cheated his brother Adam" in the quantity and value of the land sold in the specified boundaries. Complainant so stated to the defendant when he applied for a deed of conveyance. Thereupon Bullard stated to him, that if he desired to put an end to the contract he was willing that it should be done. This, however, complainant declined doing, and expressed a willingness to adhere to the contract and executed a deed accordingly.

Complainant alleges in his bill, that the number of acres within the specified boundary amounted to upwards of a thousand, and that it was within three miles of the town of Tazewell, and of the value of \$1 50 or \$2 per acre. He alleges also, that his brother Adam resided in a different county, knew but little of the value of the property sold or the quantity thereof; that his agent relied on the representations of Bullard as to both quality and quantity of the land sold, and that Bullard grossly misrepresented both. He further alleges that he did not discover the great quantity sold and the value thereof until within seven years next before the filing of the bill for the rescission of the contract of sale.

The defendant denied that the agent of complainant had relied upon his representation, as to either quality or quantity of said land—denied that he made any false representation in regard to either, or that he knew the amount purchased by him at the time of the sale. He denied that the number of acres was so great as represented in the bill, but stated that it was understood by complainant at the time of the execution of the deed, that there was much more land within the specified boundaries than the deed called for, and that the words more or less were inserted in the conveyance with that understanding; that said Peck on being so informed, stated that it mattered not, the defendant had aided his brother in the sale of his land, &c. &c.

The allegations of the bill were partially, but not satisfactorily sustained by the mass of proof introduced, which it is not deemed necessary here to set forth. There appeared to be some eight hundred or a thousand acres of land conveyed. Adam Peck stated that he relied in a great measure as to quantity and quality of land sold on the representation of Bullard, the force of which, however, was much neutralized by the fairness subsequently indicated by the conduct of Bullard.

The cause came on for hearing on bill, answer, replication and

[Peck vs. Bullard.]

proof, at the June term, 1840, before Bromfield L. Ridley, Chancellor, who being of the opinion that the complainant had been defrauded by means of the misrepresentations of defendant, decreed that the defendant was entitled to one hundred and fifty acres of the land in the specified boundaries, and that he have the liberty of selecting the same out of the entire tract, &c. &c. The defendant appealed from the decree.

R. J. McKinney. Peck supposed he was selling and conveying between one hundred and fifty or two hundred acres for a horse of the value of seventy-five dollars. It appears that he was selling between eight hundred and one thousand acres. Inadequacy is of itself a sufficient cause for setting aside a conveyance where the inadequacy is so great as at once to shock the conscience. This case comes within the case stated by Lord Thurlow in 1 Bro. Ch. Rep. 9: that to set aside a conveyance there must be an inequality so strong, gross and manifest, that it must be impossible to state it to a man of common sense without producing an exclamation at the inequality of it. The facts are proof of themselves of fraud and imposition. 2 Johnson, Ch. Rep. 23: 10 Vesey, 209: 9 Brown, Rep. p. 175. The civil law went further than the common law in this respect, and a contract for the sale of land was rescinded by judicial authority though made in good faith if the price was below one-half of the value. Fonblanque Eq. p. 47, in note.

2. Here fraudulent misrepresentation is directly proved. But if the fraud be not regarded as proven, it is still so gross a mistake as is relievable. 1 Story Eq. 572. The insertion of the words "more or less" would cover only a few acres, not double and treble the quantity intended to be sold.

3. The mistake was here discovered only about a year before the filing of the bill, and the statute of limitations runs from the time of the discovery and not from the date of the conveyance. *Haywood vs. Marsh & Ross*, 6 Yerger; *Pugh vs. Bell*, 1 J. J. Marsh. 401: *Croft vs. Arthur*, 3 Desau. 223: *Van Rhyen vs. Vincent*, Ex. 1 McChord, Ch. 314: 3 Leigh, 729: 1 Hill, Ch. 121: 4 Desau. 480.

J. A. McKinney. There is no fraud proven; the allegations of the bill are directly denied, and they are not sustained by the testimony. The insertion of the words "more or less" in the deed of conveyance, the fact being communicated to Peck that the defend-

[Peck vs. Bullard.]

ant had got the best of the bargain, and the defendant having offered, when he applied for a deed, to rescind the contract, all go to repel the existence of a fraudulent intent. Mr. McKinney commented on the cases in regard to inadequacy of consideration, and insisted that there was a distinction between contracts which were executed fully by the parties and those which were not. That here the contract had been executed for nine years previous to the filing of the bill.

2. There was no principle better established in the jurisprudence of Tennessee or abroad, than that the statute of limitation applies to courts of equity as well as courts of law. "We take the law at this day to be well settled, nay conclusively settled, that the courts of equity are equally as much bound to respect the statutes of limitation as courts of law. Such is apprehended to have been the rule of decision in the courts of equity in this State."—See *Hickman*, lessee, vs. *Gaither & Frost*, 2 Yerger, 206: *Cooke*, 179: *Peck*, 30: 9 *Wheaton*, *Tailor* vs. *Emendorf*, S. C., U. S.: in England, *Cholmondely* vs. *Clinton*, et. als. 2 *Jacobs & Walker*. Equity follows the law. But it is insisted that in courts of equity the statute does not commence running until the fraud is discovered. The courts had never gone so far as to lay down so broad an exemption from the operation of this beneficial statute. It had only been declared that it did not operate where there was a fraudulent concealment of the *wrong done*, which was relievable in equity. No such case was made out here.

TURLEY, J. delivered the opinion of the court.

This bill is filed to rescind a contract for the sale of lands to the defendant, upon the ground of fraudulent misrepresentation as to the quantity and quality of land contained within the boundaries specified by the contract.

The contract to sell and purchase was made between the defendant and the agent of the complainant, but the deed was executed by the complainant and bears date the 23d day of November, 1827. The bill to rescind was filed on the 27th day of December, 1836, nine years after the contract was executed, but the complainant alledges as an excuse for his delay, his ignorance of the fraud practised upon him. If there was any fraud in procuring the contract, it consisted in the misrepresentation of the quantity

[Peck vs. Bullard.]

of land sold; but we are not satisfied that there was any fraudulent misrepresentation. The defendant denies that he did know what quantity of land was embraced by the lines; that there was more than the nominal amount called for in the deed is true, and the defendant avers and proves that he so informed the complainant at the time he executed the deed. The proof is not satisfactory as to the existence of a fraudulent intent on the part of the defendant; but, if it were, we are of opinion that the great length of time the complainant has slept upon his right, precludes him from now asking the aid of a court of Chancery. There was no fraudulent concealment, and could have been none, of any facts by the defendant by which the complainant could be prevented from a full knowledge of his rights at any moment he might have thought proper. He had been informed before he executed the deed that the defendant had obtained an advantage over his agent; he was told at the time he executed the deed, that there were several hundred acres of land within the limits of the sale. He might have gone at that moment of time and satisfied himself both as to the quantity and quality of the land by personal observation, but this he does not think proper to do, and by accident some seven years afterwards he discovers that his conveyance covered more and better land than he had thought, and then he seeks the aid of a court. The peace of society requires those rights shall be enforced in a reasonable time, and that they shall be barred if they are not. If a man gets possession of another's land and holds it seven years it belongs to him, although the real owner might have no knowledge of the adverse possession, because it was his business to have known. Lands are acquired by a conveyance, the metes and bounds of which cover more land than the vendor designed, and after a lapse of seven years he files his bill to set it aside, because he did not know of the error sooner. Upon what principle shall he be heard, when the other is not? None that we are aware of.

Therefore, let the decree of the Chancellor be reversed, and the complainant's bill be dismissed.

UNDERWOOD'S CASE.

1. In cases at common law a party arrested for contempt will be discharged if by his answer to interrogatories filed he make such a statement as will free him from the imputed contempt, and testimony contradicting such answer will not be heard.

2. In cases in chancery, however, the rule is different. The answer of the defendant, denying the contempt is not conclusive and does not necessarily entitle the defendant to his discharge; the truth of the answer may be examined into and the action of the court regulated in accordance therewith.

3. These principles are not changed by the provisions of the act of 1801, ch. 6, sec. 22 and sec. 23.

Elizabeth Morgan, being about to marry Hambright Black, executed a deed of trust to Lewis Jordan whereby she conveyed to said Jordan certain slaves for the purpose of having them emancipated according to the laws of the State and sent to Liberia at the death of said Elizabeth, she reserving to herself a life estate therein. They were married, and the slaves came into the possession of Black.

Threats were made by Black, that he would sell the slaves, and thereupon Jordan filed his bill against Black, praying an injunction, &c. &c. in the Chancery court at Kingston. This injunction was granted and at the June term, 1838, of the Supreme court at Knoxville, on an appeal, a decree was entered up by which it was ordered that said "H. Black should be perpetually enjoined from selling any of said slaves or their increase, or in any wise interfering with or impeding the due execution of the trusts of said deed, or from taking or removing said slaves beyond the limits of this State." See Meigs, Rep. p. 147

Shortly after the rendition of this decree in the Supreme court, the slaves were clandestinely removed to the State of Mississippi. Jordan, at the July term, 1839, of the Supreme Court, made an affidavit stating that, H. Black, W. Black and Thomas J. Underwood, had removed the slaves mentioned in the decree, after the rendition thereof, to the State of Mississippi, with full notice of said decree, &c. &c. Thereupon the court made the following order:

"The complainant having disclosed on affidavit and shown to the court sufficient cause for the issuance of an attachment in this cause, it is on motion ordered and directed, that an attachment issue to the Sheriff of any county in this State, commanding

[Underwood's Case.]

him to have the bodies of the defendants before the court, to answer a charge of contempt in this court, by violating an order heretofore made in this cause."

This attachment was not executed on W. Black or H. Black, but served on Underwood. He gave bail for his appearance, and appeared at the July term, 1840, and filed his answer, denying his knowledge of the decree for a perpetual injunction. Upon this answer, Churchwell, his counsel moved that he be discharged. This was resisted by the counsel for Jordan, who tendered the affidavit of Jordan, stating that Black had notice of the decree and that he could prove the fact, and praying that proof might be taken in the cause.

Churchwell, in favor of the motion, contended that Underwood was no party to the decree, and was not chargeable with constructive notice thereof in a proceeding of this sort; because if this were so, men really innocent of all contempt would be thrown into imprisonment. The defendant had filed his answer, denying all notice of the decree and purging himself of all contempt; that this was conclusive, and the defendant should be discharged. It was never intended, under our constitution and laws, that this arbitrary and dangerous discretion should be exercised by a Judge or Chancellor, when the charge of contempt was clearly denied on the oath of the individual charged. This summary mode of arresting citizens and depriving them of their liberty, was inconsistent with the genius and nature of our free institutions, as the party was stripped of his trial by jury. He cited and commented on the provisions of the act of 1801, ch. 6, sec. 22, 23, as sustaining this view of the case:

Alexander, contra. This process of attachment for contempt must necessarily be as ancient as the courts of justice, and is a necessary incident to every superior tribunal to enforce its decrees, and command respect for its authority, 4 Bl. Com. 286. The process of attachment is merely intended to bring the party into court. When, if in a court of law, he may purge himself of the contempt on oath without his answer being controverted, and he will be discharged; but in Chancery it is different, and his answer may be disproved by affidavits of the adverse party. 4 Bl. Com. 288, 1 Bac. Abr. 286: 2 Comyn's Digest 380: Douglas 516: 1 Harrison's Chancery, 202: 4 John. 332: ib. 373; per. Kent, 6 John. Rep. 486. In 4th John. Reports, *supra*, Kent says it is the settled prac-

[Underwood's Case.]

tice of courts of Chancery to hear counter affidavits, and decide upon the testimony. And so it was admitted by Emmet counsel for Yates, page 332. There can be no difference in the proceedings, whether the person guilty of the contempt be a party to the decree alledged to have been violated or a stranger, since the gist of the offence is a knowledge of the order or decree of the court, and a wilful contempt of its authority. The difference is, when the act itself is a contempt, the person guilty being a party to the original proceeding will be precluded from denying his knowledge. See the case above in 4 John. and 2nd Atkins, 269.

RESSE, J. delivered the opinion of the court.

At the June term of this court, in the year 1838, a final decree on appeal from the Chancery court at Kingston was pronounced in the case of *Jordan vs. Black*, in favor of the complainant, and the defendant, Black, was therein perpetually enjoined from doing certain acts specified. At the July term of this court, 1839, on the ground of affidavits then filed, alledging the wilful disobedience of the decree, and the violation of the injunction referred to, on the part of the said Black, the defendant in said suit, and also on the part of one Underwood and another, process of attachment was awarded against said Black, Underwood and another; Underwood has been arrested thereon, has given bond for his appearance at the present term of this court, and he has appeared. Interrogatories have not been filed, as would, perhaps have been the proper, at all events, the more regular course, touching the alleged contempt. But he has filed, on oath, an answer in relation to his conduct and motives in the premises, which his counsel deeming full and satisfactory, have thereon moved the court that he be discharged. This is opposed by the other side, and in resistance thereof they insist that they are entitled by counter affidavits or opposing testimony to show that the explanation given in said answer, and the grounds of excuse or exculpation there set forth, are not true; and whether they be thus entitled, or whether the defendant has a right to claim his discharge by force of the facts above stated in his answer, and without enquiring into their verity, is the preliminary question which we are called upon to decide. Fortunately for our community and much to their credit, the causes which lead

[Underwood's Case.]

to discussions on the subject of contempts have hitherto been of rare occurrence, and the question referred to has not been settled in the practice of our courts. But upon referring to the authorities, it appears to be clear of all difficulty. Two propositions are maintained by these authorities; first, that in cases at common law, the defendant will be discharged, if, by his answer to interrogatories filed he make such a statement as will free him from the imputed contempt, and that opposing testimony will not be heard; secondly, that in cases in Chancery, the truth of the defendants statement in reply to interrogatories filed, may be controverted on the other side, and the whole matter be enquired into and ascertained by the court. 4th John. Rep. 332: Dane's Abridgment, ch. 220, art. 4: 4 Bl. Com. 288: 1 Harrison Chancery, 202: Douglas, 516. The power to punish summarily by process of attachment, for contempts has been coeval with the existence of courts. Hasty thinkers, proceeding on false notions of liberty, have sometimes maintained, that this power is but little in harmony with the liberal institutions of England and America. But on the contrary, it is obvious that wherever the laws govern and not the bayonets of the executive power, the courts must be armed with this summary authority in order to attain the ends of their institution. To courts of chancery it is indispensable. Their decrees are sometimes affirmative, and require an act to be done, as that one party shall convey by deed, shall surrender up an instrument to be cancelled; or sometimes negative, and restraining, as that a party shall refrain from doing a specified act. Without the power to enforce these decrees by punishing disobedience and violation of them, a court of chancery would be worse than useless, and for this reason, perhaps, the practice on the point we are considering, differs from that of a court of common law. For if the answer of a defendant in questions of contempt were conclusive, a decree might lose all its vitality and not be enforced at all. The temptation, in many cases, to defeat the efficacy of a decree by sturdy denial of imputed contempt, might be too strong for the virtue of a party. The rule, therefore, is regarded as well settled in England and in this country, that in Chancery testimony will be heard to contradict as well as to support the truth of a statement made by one against whom proceedings for contempt had been instituted.

But it has been suggested that the 22nd and 23d sections of the

[Jarnagin vs. Conway.]

act of 1801, ch. 6, have changed the practice referred to. We are satisfied that such is neither the purpose nor the effect of any provision contained in that statute; but that the settled course of proceeding in the point we have been considering, remains unchanged by the act of 1801, ch. 6. Such affidavits as may be offered to contradict the answer of defendant Underwood, filed in the present case, will therefore be received as evidence.

JARNAGIN vs. CONWAY, *et als.*

1. Porter devised his real and personal property to his wife Sarah with power to appropriate and dispose of the same as she might deem proper amongst her children: Held, that Sarah Porter under this devise held this property subject to a trust for the benefit of her children.

2. A power of appointment to children does not authorise appointment to grand children.

3. It is a principle sanctioned by reason and authority, that when one engages in an act so solemn and important as the execution and publication of a last will and testament, he is not to be presumed as intending with reference to any portion of his property to die intestate.

4. It is a rule in the construction of last wills and testaments well settled, that the scope and import of the entire instrument are to be considered for the purpose of discovering the intention of the testator; and that such intention, when once discovered, is of paramount and controlling importance.

5. A testatrix made a last will and testament in which were these words, "I bequeath all the balance of my property, both real and personal, that I am possessed of, consisting of four negroes, viz. Charlotte, Abraham, Ann and Warner, household and kitchen furniture, stock of all kinds, wagons, goods, &c.:" Held, that the testatrix intended to devise all the balance of her earthly estate; that the general phrases, "all my property, both real and personal," embraced four thousand dollars in cash not mentioned, and that the subsequent specification of property does not restrict the operation of the above general phrases.

John A. McKinney, for complainant.

Robert J. McKinney, for defendants.

TURLEY, J. delivered the opinion of the court.

Charles T. Porter executed his last will and testament on the 5th day of February, 1822, by which he devised (after the payment of all his just debts,) every species of his property, both real

[Jarnagin vs. Conway.]

and personal, to his wife Sarah Porter, with power to dispose of and appropriate the same as she might deem proper amongst her children.

In the year 1835, Sarah Porter departed this life, leaving her last will and testament by which, after a specific legacy to her daughter Sarah Hogain, of one mahogany side board and one dozen gilt windsor chairs, she devised all the balance of her property, both real and personal, that she died possessed of, consisting of four negroes, viz: Charlotte, Abraham, Ann and Warner, household and kitchen furniture, farming utensils, wagons, gears, &c., horses and lands to her three children, Sarah Hogain, Wm. Turner Conway, James Christopher Conway, and her grand son Joseph Porter Conway.

At the time of the death of the said Charles T. Porter, he had, deposited to his credit in Bank at Knoxville, the sum of four thousand two hundred and six dollars, which his widow Sarah permitted to remain undisposed of, being ignorant, as is believed, of the fact of its existence. The complainant is a grand child of the said Sarah, and files this his bill for a distributive share of the four thousand two hundred and six dollars, which he contends did not pass by her will, and also for a distributive share of the money and debts on hand and due her at the time of her death, and which he also contends did not pass by her will.

The 1st question is, as to complainant's right to a portion of the four thousand two hundred and six dollars, which he contends did not pass by the will of his deceased grand mother. We are of the opinion that in no point of view in which this question can be looked at can this pretended right be sustained. That the sum of money passed by the will of Charles T. Porter to his wife Sarah, subject to the trust for the benefit of her children, is not disputed; and whether she executed the trust in relation thereto or not, can make no difference to the complainant; he is not an object of the bounty of Charles T. Porter, and can claim nothing under his will.

That a power of appointment to children does not authorise an appointment to grand children, is too well settled to admit of controversy. See Sugden on Vendors, 501 : Powell on Devises, 158 : 4 Kent Com., 339, and the authorities there referred to for the truth of this proposition. The complainant then having no right to any

[Jarnagin vs. Conway.]

portion of this sum of money, cannot move a court of Chancery in relation thereto.

The 2nd question is, as to the complainant's right to a distributive portion of the money on hands, and the debts due his grand mother, Sarah Porter, at the time of her death.

It is contended that money and debts due, did not pass under her will. The words of the will are, "I give and bequeath all the balance of my property, both real and personal, that I die possessed of, consisting of four negroes, viz: Charlotte, Abraham, Ann and Warner, household and kitchen furniture, stock of all kind, wagons, gears, &c." It is not denied that the words "all the balance of my property, both real and personal, that I die possessed of" are sufficiently comprehensive to pass all the estate of the testatrix, but it is contended that the subsequent words which attempt to specify of what that estate consisted, limit the operation of these words, and confine them to the things specifically mentioned, viz: negroes, household and kitchen furniture, stock of all kinds, wagons, gears, &c. We do not think that this is the legal construction of the will. In the case of *Williams vs. Williams*, 10th Yerger, 25, this court says, "It is a principle, sanctioned alike by reason and by authority, that when one engages in an act so solemn and important as the execution and publication of a last will and testament, he is not to be presumed as intending, with reference to any portion of his property, to die intestate. Again, it is well settled that in the construction of last wills and testaments, the scope and import of the entire instrument are to be considered for the purpose of discovering the intention of the testator, and that such intention, when discovered, is of paramount and controlling influence." Now, it is impossible to read the will of Sarah Porter without being satisfied that it was not her design to leave any portion of her estate undevise, and that it was her desire that it should go to the persons named as legatees in her will, and to give it the restricted construction contended for, would be a gross violation of both these intents. But we are furthermore of opinion, that the words negroes, household and kitchen furniture, stock of all kinds, wagons, gears, &c., are not in themselves restrictive of the general bequest of "all the estate, both real and personal," of the testatrix. A few of the more prominent articles of the personal estate are specifically mentioned, and the words, &c. are then used with the design

[McConnell vs. Commissioners, etc.,]

to cover every thing else, and are sufficiently broad and comprehensive to do so.

We are, therefore, of the opinion that the complainant is entitled to no relief in any aspect of this case, and affirm the decree of the Chancellor, dismissing the bill.

McCONNELL vs. COMMISSIONERS of *Madisonville*.

1. The Legislature have the power to dispose of a portion of the vacant and unappropriated land belonging to the State for public purposes, such as the establishment of a county seat, for a less consideration than the lands are disposed of to citizens generally, and to make such disposition prior in point of time to the opening of an Entry Taker's office for general entry.

2. The act of 1823, ch. 260, authorizing certain commissioners specified in said act "to select one hundred and sixty acres of vacant and unappropriated land in said county of Monroe, and obtain a grant for the same from the Register of East Tennessee in their names as commissioners" for the purpose of establishing a county seat in said county, was intended to enable the said commissioners to obtain a statutory title to the amount of land authorized to be selected in a mode different from that of general entry.

3. The commissioners determined upon the selection of a quarter section, gave the Entry Taker, before the opening of his office, the number of the quarter section, and the name of the county seat was written across the quarter section on the map of the district: Held, that such acts constituted a selection and appropriation of the quarter section in question by the commissioners for the purpose aforesaid, and was the inception of a statutory title which could not be defeated by any subsequent entry after the opening of the office.

4. The 7th section of the act declares that the commissioners shall not sell the lots until they had acquired a title to the property bargained for: Held, that this section is merely directory in its character; the fact that the commissioners did sell lots after the appropriation and before obtaining the grant would not render void the previous selection and appropriation of the land so as to subject the land to entry. This question could only be raised by purchasers at the sale of the lots.

5. Where defendants in answer to a bill set up the plea that they are innocent purchasers for a valuable consideration, and there is nothing to contradict such answer, such plea so set up must prevail and the bill be dismissed.

This bill was filed by complainant McConnell in the Chancery Court at Madisonville, Monroe county, against the commissioners of the town of Madisonville and purchasers of lots sold by the commissioners. It was filed on the ground, that complainant had re-

[McConnell *vs.* Commissioners, etc.]

ceived a certificate from the Treasurer of East Tennessee, by virtue of the provision of the act of 24th October, 1823, for sixteen hundred and thirty acres of land, and that the Surveyor had surveyed the same for him according to law. This survey included the thirty acres on which a part of the town of Madisonville had been located. The Register refused to issue a grant to McConnell for the thirty acres, on the ground that it had been previously appropriated by the commissioners, by virtue of an act of Assembly, &c.

The commissioners sold lots to sundry individuals, who were made parties defendant to the bill. The bill prayed that the title of the commissioners and of the purchasers should be vested in complainant, &c.

The cause was heard on bill, answer of defendants, replications and proofs before Chancellor Williams, who dismissed the bill. The complainant appealed.

All the material facts in the record are set out in the opinion of the court, which was delivered by S. J. W. Lucky, specially commissioned to determine this case and others at this term.

Jarnagin, for complainant.

Hynds, for defendants.

Lucky, J. delivered the opinion of the court.

The pleadings and proofs in this case, so far as it is necessary to notice them, in the opinion of the court, show the following facts. The complainant was a purchaser at the Hiwassee land sales, in the year 1820, of a tract of land, for which he obtained a certificate, and paid into the Treasury \$815 04, being one-fourth of the purchase money. For this land he was sued in ejectment by John Hildebrand, who claimed as a reservee under the treaties of 1817 and 1819. During the pendency of the suit, an act of Assembly was passed, 24th of October, 1823, authorising the complainant to compromise this suit and others, and in default of his doing so he was to certify the fact to the Treasurer of East Tennessee, whose duty it was made to issue certificates to the purchasers, for as much land as they had paid money into the Treasury under the original purchase, at fifty cents per acre, and the Surveyor of the Hiwassee District was authorised to survey the same. The suits

[McConnell vs. Commissioners, etc.]

were not compromised under the authority of the act, but were lost, and the Treasurer, by virtue of the authority of the act, issued a certificate to the complainant for 1630 acres of land, dated 23d February, 1824. This land was surveyed for McConnell on the 2d April, 1824, and included thirty acres of land in the north east side of the south east quarter of section 34, township 2, range 2, east of the meridian, Monroe county. On these thirty acres is situated a portion of the town of Madisonville, formerly Tellico. The Register of the Hiwassee District refused to issue a grant to McConnell for the thirty acres, on the ground that he had before the presentation of the certificate of the Surveyor and Treasurer, issued a grant to the commissioners of the town of Madisonville for the same land.

An act was passed on the 22d November, 1823, ch. 260, to establish the seat of justice for the county of Monroe. The 12th section of this act authorised the commissioners under it "to *select* one "hundred and sixty acres of vacant and unappropriated land in "said county of Monroe, and obtain a grant from the Register of "East Tennessee for the same, in their name as commissioners afore- "said, for the use and benefit of said county town." In obedience to the authority vested in the commissioners by this act, on the first Monday of February, 1824, they selected a quarter section of land, which included the thirty acres now in dispute, and took possession of the same before the complainant had his survey made. The lots of the town were sold in the spring of 1824.

The selection was complete and consummated before the commissioners had any knowledge of the complainant's claim. Before the opening of the Entry Taker's office in the Hiwassee District, one of the commissioners designated in the act of Assembly gave the Entry Taker the number of the quarter section which the commissioners had selected, the name of the town was written across the quarter section in the map of the district, and notice of this selection, both written and oral, was publicly given. The lots were sold in May, 1824, and a grant issued to the commissioners 19th June, 1826.

The purchasers of lots from the commissioners rely upon all the grounds of defence applicable to the commissioners; and, also, that they are purchasers for a valuable consideration without notice of complainant's claim, and entitled to the protection of the court.

At the time of the passage of the act of 1823, appointing com-

[McConnell *vs.* Commissioners, etc.]

missioners for the seat of justice for the county of Monroe, the Entry Taker's office for the Hiwassee district was not open for the purpose of receiving entries. By an act of the same session of the Legislature, chapter 26, that office was established and directed to be opened on the first Monday of February, 1824.

The prayer of the complainant's bill in this case is, that the title of the commissioners of the town of Madisonville and the purchasers from them for the thirty acres in controversy may be divested out of them and vested in the complainant. This is resisted on several grounds, all of which it is not deemed necessary, in the opinion of the court, to consider.

At the time of the passage of the act of 1823, appointing commissioners for establishing the seat of justice for the county of Monroe, the fee simple to the territory of country called the Hiwassee District, or at least a greater portion of it, was still in the State of Tennessee, not having been subjected to general appropriation or entry. As to that portion of the territory which was vacant and unappropriated there can be no question but that the legislature had a right to dispose of it in any manner which it thought proper. In pursuance of this purpose, the 12th section of the act appointing the commissioners of the town of Madisonville, formerly Tellico, was adopted. The selection of a suitable location for the seat of justice for the county of Monroe, was deemed an object of public utility; and as the State owned large quantities of vacant unappropriated land, the bestowment of a portion of it for public purposes, for a less consideration than it was disposed of to citizens generally and prior in point of time, was deemed not inconsistent with the duty of the legislature to the community at large, all of whom had an interest in the proceeds of the sales of the Hiwassee lands. These lands had been surveyed, but there was no office opened for the reception of entries; and thence the legislature departed from their ordinary language, and say, "that the commissioners for the county seat of Monroe, shall be permitted to select one hundred and sixty acres of vacant and unappropriated lands" for the purpose aforesaid. The commissioners were not required to await the opening of the Entry Taker's office on the first Monday in February, 1824, before they could make a selection, for that might have defeated the object of legislative bounty, but they were permitted to make their selection forthwith, or at least there is nothing in the act to negative this idea, and every

[McConnell vs. Commissioners, etc.]

thing to lead to a contrary conclusion. The money was to be paid to the Treasurer of East Tennessee when the grant was issued, and all other enterers were to pay to the Entry Taker. The title of the commissioners was intended by the legislature to be a peculiar statutory title. The mode of selection on the part of the commissioners was designed to supersede the ordinary method of entry which was confined to the community at large. The State had guarded the right of the occupants by requiring the commissioners to select vacant and unappropriated land.

It is objected in this case, that by the 7th section of the act appointing the commissioners, they had no authority to sell the town lots until they had procured a title for the land. So far as the rights of the complainant in this case are concerned, this objection cannot be valid. It does not make void the title of the commissioners, and is merely directory in its character, and as we think could not effect the sales in the slightest degree. Any question that might arise under this section, would be between the commissioners and the purchasers at their sales. It is not improbable that this section had reference to another provision of the act, which authorised the commissioners to purchase land of individuals if necessary.

We are, therefore, clearly of opinion that the selection of the commissioners, which was the inception of their title, having been made prior to the acquisition of any claim or right on the part of the complainant, that they have the better title both legal and equitable, and that it must prevail. The selection was made by the commissioners on the 2d of February, 1824; the certificate of the Treasurer, upon which the complainant rests his claim, did not issue until the 23d of February, 1824. In addition to this, the purchasers alledge in their answer, and there is nothing in the whole record to contradict it, that they are innocent purchasers for a valuable consideration, and so far as they are concerned, this is an insuperable barrier to the recovery of the complainant.

In the view which we have taken of the case, we have not deemed it necessary to say any thing on the question of the statute of limitations, which is raised in the pleadings, as the other questions are decisive of the case. Let the decree of the Chancellor be affirmed with costs.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE.

NASHVILLE: DECEMBER TERM, 1840.

GOODMAN vs. W. T. and E. FLOYD.

1. In fixing the value of a slave sued for in detinue, the Jury are not bound by the value laid in the writ and declaration, but may return a verdict for a larger amount; *secus*, in regard to damages for the detention of such slave.

2. Where, in an action of detinue, the jury gave the plaintiff judgment for the value of a slave and *damages for the detention of him to a larger amount* than was demanded in the plaintiff's declaration: Held, that the court having reversed the judgment for such error should proceed to render such judgment as should have been rendered below, to wit., for the amount of damages claimed in the declaration; provided the plaintiff would release the surplus.

This action of detinue was commenced in the county of Franklin, by W. T. & E. Floyd against John Goodman, on the 10th day of December, 1831, for the recovery of two slaves. The plaintiffs fix the value of slave Tony, in their writ and declaration, at \$500, and Priscella at \$300, and their damages at \$500. After various continuances and trials the venue was changed to the county of Warren. At the April term, 1839, it was tried upon the plea of not guilty, and a verdict rendered for the plaintiffs for the slaves, which fixed the value of Tony at \$550, and Priscella at \$325, and ascertained the damages to be \$585. The defendant did not appeal, but at a subsequent period presented his petition, accompanied with a transcript of the proceedings in the Circuit courts of Franklin and Warren to Judge Green, praying an order for writs of error and supersedeas, returnable to the next term of the Supreme court, for error apparent on the face of the record in this, to wit, that the value of the slaves as ascertained by the Jury, and the damages assessed for the detention thereof, were each

[Goodman vs. Floyd.]

greater in amount than the value and damages set forth in the plaintiff's writ and declaration. Judge Green issued his fiat to the Clerk of the Supreme court, in accordance with the prayer of the petitioner, on the 25th August, 1840, and the cause was brought up.

James Campbell, for plaintiff in error.

Taul, for defendants in error.

TURLEY, J. delivered the opinion of the court.

This is an action for detinue, of two negroes, the value of which are specified in the writ and declaration. In the declaration the damages for the detention are laid at \$500. In the verdict of the jury the value of the negroes is assessed at different and higher prices than that fixed by the declaration, and the damages for the detention are assessed at \$585, being \$85 more than the damages laid in the pleadings. And now two questions are made for the consideration of the court.

1st. It is said that a jury cannot in an action of detinue, find the value of the property sued for, greater than that which is affixed to it by the pleadings. To this we answer, that the action of detinue, being for the recovery of the specific thing sued for, does not sound in damages, and that, therefore, the value of the property detained, is not the thing recovered, but the thing itself. But in as much as a court of law has no power to enforce, under all circumstances, the delivery of the specific thing, it has been found necessary to have its value ascertained by the jury, so that money may be recovered in lieu thereof, if found necessary. And in as much as the object of the action is to get the thing, and not damages, the jury are warranted, in fixing its value, to give such amount, in reason, as will enforce its delivery. From this it follows, that the value of the thing at the time of the verdict, must be the medium by which the jury are to ascertain what amount of money is to be substituted in the place of the thing itself, provided it cannot be had. If it has appreciated in value after the commencement of the suit, the appreciated value must be given by the jury; if depreciated, the depreciated value, and with such excess thereon as will, in their judgment, enforce the specific delivery, and this without regard to the value as laid in the pleadings. There is nothing in the authorities produced to the contrary, sustaining the position assumed. They only prove that, in an action of detinue, the jury

[Hodges vs. Mayor, etc.]

must assess the value of the property sued for, which is unquestionably true—because that is the only certain means by which the judgment of the court can be enforced.

2nd. It is said, the amount claimed for the detention of the negroes is strictly damages, and unliquidated, and as such the jury cannot in the assessment go beyond the amount laid in the declaration, and of this opinion is the court.

When the damages for the detention of a debt are fixed by law, in the shape of interest, and nothing more is given, the court incline to think, that they follow as a consequence the principal, and may be given to a greater amount than laid, but when they are not given by law, and are at the discretion of the jury, it feels bound by the weight of authority to say, that they cannot be assessed beyond the amount claimed. Chitty's Plead. 130, 408.

The damages laid being \$500, and the damages assessed being \$585, the judgment of the court below must be reversed. But we are not left in the situation of a Court of Error in England, which as is correctly argued, cannot reduce the sum to the amount laid in the declaration, but may by our statute law, after having reversed the judgment of the inferior court, give such judgment as it ought, which would be for the amount claimed in the declaration, provided the plaintiff will release the surplus.

We therefore reverse the judgment of the Circuit court, and at the option of the counsel for defendants in error, remand the cause for further proceedings or give judgment for the negroes at the value assessed by the jury, and \$500 damages for their detention.

HODGES vs. THE MAYOR and ALDERMEN of Nashville.

1. The Corporate authorities of the town of Nashville, under a grant of power to "license, regulate and restrain theatrical amusements," may exercise the taxing power as a means to effect this object.

2. The 2d section of the act of 1806, ch. 33, conferring the power upon the Corporate authorities to license, regulate and restrain theatrical amusements, and authorising the use of the taxing power as a means to regulate and restrain them, is not a law to tax theatrical amusements, within the meaning of the act of 1819, ch. 51, sec. 2, and the grant aforesaid of 1806 is, therefore, not repealed by the 2d section of the act of 1819, ch. 51.

On the night of the 4th day of November, 1839, Hodges had a theatrical exhibition within the limits of the Corporation of Nash-

[Hodges vs. Mayor, etc.]

ville, without a corporation license. On the next day the Mayor and Aldermen sued him before justice Hall, of a "plea that he render to them the sum of fifty dollars, which to them he owes, and from them detains, in consequence of a forfeiture or penalty by him incurred" for said exhibition, contrary to the provisions of the 2d section of an act passed by the Mayor and Aldermen on the 19th day of November, 1836.

This by-law in the first section provides for licensing, regulating and restraining theatrical and other exhibitions, and in the second section, imposes a forfeiture of fifty dollars for exhibiting such theatrical entertainments without a corporation license, to be recovered in the name of and for the use of the corporation, before any jurisdiction having cognizance thereof.

The defendant insisted that the act of 1806, ch. 33, sec. 2, authorising the corporate authorities to license, regulate and restrain theatrical exhibitions, by means of the taxing power, was repealed by the act of 1819, ch. 51, sec. 2, and that the by-law in question was contrary to the law of the State and therefore void. Hall rendered judgment against the defendant for the amount of the penalty and costs. From this judgment the defendant appealed to the Circuit court of Davidson.

The facts being agreed upon by the parties, the cause was submitted to the consideration of Judge Maney, at the January term, 1840, who being of the opinion that the law of the case was with the plaintiffs, affirmed the judgment of Hall. Hodges appealed in error.

Hollingsworth, for plaintiff in error.

In this case, from the acts of Assembly of this State, it is insisted that the Corporation had no power, and of right could not lay a tax on theatrical exhibitions.

The first act in this State in relation to taxing shows, is that of 1811, ch. 43, 2d Scott's Rev. p. 28, 29. This merely imposed a tax of \$5, with a penalty of \$25 for its violation. The next is the act of 1813, ch. 88, same book, p. 150, which is amendatory of the above act, and simply raises the tax to ten dollars, and the penalty to fifty dollars. The next is the act of 1815, ch. 63, same book, p. 209-10. This act requires the same license, but requires the exhibiter to take out a license in *every county* in which he exhibits, and increases the penalty to one thousand dollars. In all the above

[Hodges vs. Mayor, etc.]

recited acts, from their very terms, theatrical exhibitions are not included.

The next act on this subject, is that of 1819, ch. 51, same book, p. 196-7. This act is still broader and more comprehensive in its terms than the preceding, and requires any person "who shall wish to exhibit any feats of activity, sleight of hand, or any other exhibition for which money is taken," to take out a license in every county in which he exhibits, for which he shall pay fifty dollars, and also alters the penalty to five hundred dollars. But in order to obviate any doubt on the subject, in relation to theatrical exhibitions, there is this proviso: "*Provided*, That nothing in this act contained, nor shall any other act, now in force and use in this State, be so construed, as to tax or prohibit any concerts or any theatrical exhibition." The acts of 1835, ch. 13, sec. 4, and of 1837, ch. 77, sec. 1, refer merely to the preceding acts on the same subject, and in no particular repeal the proviso of the act of 1819. The act of 1806, ch. 33, 1 Scott's Rev. 960-61, which is the act of incorporation of said town, among other powers, gives that of licensing, regulating, or restraining theatrical or other public amusements within the town, and the power to pass all laws and ordinances necessary to carry the intent and meaning of said act into effect: but with this *proviso*, that they should be compatible with the laws and constitution of the State.

There being no law to the contrary, it is not denied that the Corporation had the power claimed up to the passage of the act of 1819, ch. 51, which made an express exemption of concerts and theatrical exhibitions, and that far, was a repeal of the act of incorporation of 1806, ch. 33, sec. 2, and took away from the said Corporation the power of licensing theatrical exhibitions. The Corporation is the mere creature of the law, and under its charter, must, in the exercise of its powers, conform to the law of the land. 2 Kent Com. 275, *Durham vs. Trustees of Rochester*: 5 Cowen, 464: 2 Kidd on Corporations, 107-9: *Commonwealth vs. Bean*, 3 Wheeler's Crim. Cases, 77-8.

Meigs, for defendants in error.

This case, it is supposed, does not come within the principle of the case of *Robinson vs. The Mayor and Aldermen of Franklin*,*

* See *Humphreys' Rep.* Vol. 1, p. 156.

[Hodges vs. Mayor, etc.]

decided at last term. The court declared the penalty imposed in that case by the by-laws to be illegally imposed, because it assumed to prohibit the party from doing what he may have been licensed under the general law to do, and which, whether he was thus licensed or not, the Corporation of Franklin could neither authorise him to do, nor prohibit him from doing. The money claimed of Robinson was neither a fine nor a tax, but a forfeiture or penalty imposed because he neglected to take from them a license to do what they had no authority to license. Had it been a *fine*, it would have been within their *regulating* and *restraining* power; and had it been a *tax*, it would have been referable to the power of taxing, as in the case of the *Mayor and Aldermen of Columbia vs. Beasley*, decided at the June Term.*

The forfeiture in this case, it is true, is imposed nearly in the very words as that in the Franklin by-law. But the Franklin law assumed to act upon a subject which was not in their power; whereas, in one case, nothing is claimed but what is granted. To make the cases the same, it ought to be shown that the revenue law of 1835, ch. 13, sec. 4, or some other revenue law of the State embraced theatrical exhibitions, and that to perform them, a State license was necessary. The exhibitions spoken of in the act of 1835, which are not to be had without a State license for each county, are the same as those mentioned in the act of 1819, ch. 51, sec. 1, and are described nearly in the same language. But the proviso of the 2d section of that act fixes the construction of that language, and declares that it does not include "concerts, or any theatrical exhibitions." Accordingly, neither of these has been taxed. While, then, it is the pleasure of the State not to tax theatrical exhibitions, it is at the same time the pleasure, as expressed in the act of 1806, ch. 33, sec. 2, 1 Scott, 960-1, to grant to the corporation "full power and authority to provide for licensing, regulating or restraining theatrical or other public amusements within the town" of Nashville. It is a lawful exercise of this power of licensing, to enact, that before any person shall exhibit, &c., he shall first obtain a license from the Recorder, paying him, for the privilege, a certain sum; and to impose a forfeiture for exhibiting without first obtaining the license, as is done in the by-law of the 19th November, 1826. See city laws, 35. The

* See Humphreys' Rep. Vol. 1, p. 232.

[Hodges vs. Mayor, etc.]

State may, and she often does, impose penalties for doing certain things without license, as is done in the very case of exhibitions, &c., in the act of 1837-8, ch. 167, for making which without license the revenue act of 1835 imposes no penalty. But, by the same power, in the exercise of which the State assumes to license some exhibitions, and to impose penalties on those unlicensed exhibitions, she may delegate her right of granting licenses in cases where she allows the exhibition without a State license, to the municipal bodies within her limits. The State might, if she chose, exact a tax for theatrical exhibitions; and by the same right, she may both give the tax, and the power of imposing it, to the corporations within which those exhibitions usually take place. Whenever the State shall pass a law to license theatrical exhibitions, this will be a resumption of the power now delegated to several municipal bodies in the State, and then those bodies can no longer license them, nor, of course, any longer exact penalties for unlicensed exhibiting, however they may regulate or restrain them by *taxes* or by *finer*.

E. H. Ewing, for plaintiff in error. Have the defendants the right to tax theatrical exhibitions in the town of Nashville, by virtue of their charter and the amendments to it?

By the constitution the taxing power is vested in the legislature exclusively. The legislature is, however, authorised to delegate this power to incorporated towns to a certain extent. The power to tax thus delegated may be modified or withdrawn. The town possesses the power solely in virtue of the delegation; and the by-law imposing the tax derives its whole vigor from the act of Assembly giving the power. If the act of Assembly be repealed, the by-law becomes nugatory. The by-law is then the mere conduit of the act of Assembly. These general positions will hardly be disputed.

In this case, then, the legislature by the act of 1806, ch. 33, sec. 2, conferred upon the municipal authorities of the town of Nashville the power to tax "theatrical exhibitions," which power was exercised through a by-law passed the 19th November, 1836. By an act passed in 1819, ch. 51, the legislature provides generally for taxing "shows," &c., and provides in the 2d sec., that "nothing in this act contained, nor shall any other act now in force and use in this State be construed so as to tax or prohibit any theatrical ex-

[Hodges vs. Mayor, etc.]

hibitions." Is this a repeal of the aforesaid act of 1806? The words are general "no act shall be so construed:" the act of 1806 is one and is included; then the act of 1806 "shall not be construed so as to tax, &c." Suppose this to be the actual reading of the act of 1819, this would be no question—it is in effect and substance the reading of that act. "Be construed so as to tax" is not correct English; make it so and the act will read, "be construed so as that theatrical exhibitions shall be taxed." Then the substantial reading, so far as we are concerned, would be this, "the act of 1806 shall be so construed as that theatrical exhibitions shall be taxed." If this were the literal reading of the act, we should have no dispute.

But it may be insisted that the statute is intended to apply only to cases of taxation by the legislature directly, and that this is its whole scope.

1st. The words are general, and unambiguous and cannot be restrained.

2nd. This law of 1806 is the only law giving authority to tax or taxing theatrical exhibitions.

3rd. If it be admissible to allude to the history of the country, Nashville in 1819 was the only scene of these exhibitions, the only place where a by-law existed, and there was as above stated, no general law, taxing theatrical exhibitions.

But is a power given to a corporation ever withdrawn by general words in an act of Assembly, or must there be a special reference to the act conferring the power, and a special repeal of it? There is no rule of law known to me by which it is necessary to mention corporations in an act of Assembly, specially, that they may be included within its provisions. At all events the burden of producing such authority rests with our opponents. It is unnecessary to discuss the difference between municipal and other corporations; though an examination of this difference would render this last question more clearly favorable to us. Private corporations have generally vested rights in the grants of privileges made to them, or at least have a private and individual interest in such grants. In the former case it is proper to presume that the legislature has not exceeded its legitimate or constitutional powers, and in the latter that they have not churlishly interfered with that which was a favor to a set of individuals. Grants to municipal corporations on the contrary, being merely part of the machinery of gov-

[Hodges vs. Mayor, etc.]

ernment, may be as readily supposed to be interfered with or altered as any other more general provision. It is believed, however, that no authority can be shown exempting any persons, whether natural or artificial, from the operations of the general words of a statute, except "the sovereign power," and possibly another exception not necessary to be mentioned here.

TURLEY, J. delivered the opinion of the court.

This is an action brought by the Corporation of Nashville to recover from the plaintiff in error, a penalty of fifty dollars, for having opened a theatre and exhibited plays within the limits of the city without having obtained from the corporate authorities a license therefor. And the question is, as to the power of corporations to inflict the penalty for so doing. The law of the Corporation under which the suit is brought, was passed on the 19th of November, 1836, (city laws, 35,) and clearly warrants a recovery, provided the Corporation had power to pass it. To enable it to have done so, the power must have been conferred by legislative authority. The town of Nashville was incorporated by the act of 1806, ch. 33, in the 2d section of which, among other things, the power is given to the Corporation to provide for "licensing, regulating, or restraining theatrical or other public amusements within the town." This it is admitted is sufficient to sustain this action, provided the power thus given has not been withdrawn by subsequent enactments; but it is contended that this has been done by the 2d section of the act of 1819, ch. 51. The title of that act is an "act laying a tax on shows," and it is provided in the 2d section, that "nothing therein contained, nor in any other act then in force and use in the State, shall be construed so as to tax or prohibit any concerts or any theatrical exhibition." The legislature were making provisions in this statute for revenue for State purposes, and chose to exempt concerts and theatres, not only from its operations, but likewise from all others of a like nature, if there were any that embraced them by construction or otherwise. That is, the legislature did not choose to raise a revenue from concerts or theatres. But how can it be contended that this exemption repealed the power previously granted to the Corporation to regulate, license and restrain them. When the power was granted, the State did not tax them, neither does it now. How is the Corporation then in a differ-

[Williams vs. Hurt.]

ent position at present, from what it was when enacted? Upon this subject the statute of 1819 exempted them from the operation of any law taxing them. There was no law previous to 1819 which could, by any rule of construction, be made to tax them. The act of incorporation, passed in 1806, is not a taxing law, it is only a law conferring upon the Corporation the power to tax, and, therefore, cannot be operated upon by the 2d section of the act of 1819. The law of incorporation which levies the tax, was passed in 1836, and is, therefore, most clearly out of the operation of the act of 1819, if that act could be held to have repealed the law of the Corporation if it had been previously passed. We are, therefore, of the opinion that the judgment of the Circuit court should be affirmed.

WILLIAMS vs. HURT.

1. Williams sold to Hurt a jackass for fifteen hundred dollars, of which five hundred were paid at the time of purchase and note executed for the balance; Williams executed a bill of sale to Hurt in which the jack was warranted to be as sure a foal-getter as common for jacks. Hurt became dissatisfied with the jack and proposed to return him. It was then agreed that Hurt should make a further trial of the jack, and if half the mares put to him should not prove with foal then it should be optionary with Hurt whether he should return him or keep him and pay five hundred dollars. The jack failed, was returned and accepted by Williams: Held, that the return and acceptance of the jack vacated both contracts and that Williams was liable in assumpsit for the five hundred dollars paid.

2. Where there is a sale with warranty or if by the special terms of the contract the vendee is at liberty to return the article sold, an offer to return it is equivalent to an offer accepted by the vendor, and in either case the contract is at an end.

This is an appeal in error from a judgment rendered by the Circuit court of Davidson county, at the May term, 1840, in favor of Hurt, for \$657 50, against Williams. Williams appealed in error to the Supreme court.

Edwin H. Ewing, for Williams.

Meigs, for Hurt, cited *Thornton vs. Wynn*, 6 Condensed Rep. 515: 7 East, 274: 1 T. R. 133: 5 John. 85: Chitty on Con. 362.

[Williams vs. Hurt.]

REESE, J. delivered the opinion of the court.

An action of assumpsit to recover five hundred dollars, as being money had and received to the use of Hurt, was brought by him against Williams the plaintiff in error. The case was, that Williams had sold to Hurt, for the purpose of breeding mules, a jack-ass, at the price of fifteen hundred dollars; five hundred of which, were paid him, and a note given for the remaining thousand. On the 2nd day of February, 1835, Williams gave to Hurt a bill of sale for the animal, in which he "warranted him to be sound and healthy, and as sure a foal-getter as common for jacks." About the 12th of April, 1836, Hurt, who resided in the Western District, came to Nashville to see Williams, and informed him that the jack was not a good foal-getter, and requested Williams, that the animal should be taken back by him. Williams objected to taking him back, and insisted that Hurt should keep him, and make further trial of him. Whereupon, the following agreement was signed by both parties: "Whereas, doubts are entertained of the jack, I, Willoughby Williams, sold to Robert Hurt, of Carroll county, Tennessee, not being a sure foal-getter, as is common for jacks, the said Hurt and myself have this day entered into the following agreement, to wit: The said Hurt is to stand the said jack from the time he returns home, till the 1st of September next, and on the first of September, 1837, if it shall be ascertained that two-thirds of the mares has proved in foal, then the said Hurt will be due the said Willoughby Williams one thousand dollars at that date; but if it shall be ascertained, that one-half, and under two-thirds of the mares has proved in foal, then the said Hurt will be due at the time aforesaid only seven hundred dollars. And if it shall be ascertained, that less than one-half of the mares has proved in foal, then it shall be optionary with said Hurt to pay at the time aforesaid, five hundred dollars, or return the jack to said Williams, if he be living. But if the said jack die before September, 1837, the said Hurt is to pay nothing more. The said Hurt is to be governed by the written instructions of the said Williams."

It was proved that from April to September, 1836, the animal was well kept and properly governed, and was in good general health and condition, but the product of the season turned out, in the following year, to amount to two mares only, being little more than one-tenth of the number of mares submitted to him. There

[Williams vs. Hurt.]

was also proof, tending to show his incompetency in the year 1835. At the time indicated in the contract of April, 1836, Hurt returned the animal to Williams, who took him back. His Honor, the Circuit Judge, charged the jury, that, if from the evidence, they believed, that before the contract of April, 1836, there had been a breach in the warranty, given upon the sale in 1835, they should find for the plaintiff below, if not for the defendant.

The verdict was for the plaintiff, which the court, on a motion for a new trial, refused to set aside, and the defendant has prosecuted his writ of error, and insists here, first, that the charge of the court is erroneous, and secondly, that the verdict, upon a proper construction of the contracts set forth, cannot be maintained. If there be error in the charge of the court, it is not error of which the plaintiff here can justly complain: because we think, the proper construction and legal effect of the contracts, connected with the conduct of the parties relating to them, make the verdict which was found, the only one which ought to have been rendered. The second contract is to be regarded as based upon the first, and as incorporated with it. It was made at the instance, and for the benefit of Williams, in order that a further and fuller experiment of the competency of the animal might be made under his instructions. It ascertained, what the first contract left uncertain, namely, that the ordinary competency of such animals, shall be regarded as consisting in success in two-thirds of the cases, and the damages for a less than ordinary, but still valuable degree of competency, between two-thirds and one-half, is fixed, in the particular instance at two hundred and fifty dollars. If a near approach to this degree of competency, to wit, one-half of the cases, were made, it was probably thought by the parties, that Hurt might choose to retain him and pay five hundred dollars more, but even then, and especially in the still worse case which happened, he might choose to return him. He did choose to return him, he was accepted, and the property reverted in Williams. The animal may be very valuable to him, to breed with jennets or even perhaps, under his superior management to produce mules. At all events, the legal effect of the return, and the acceptance, is, to terminate both contracts, and to leave the five hundred dollars paid Williams, as money in his hands received to the use of Hurt, and this, without any express stipulation. In a case to which we have been referred, *Thornton vs. Wynn*, 12 Wheat. Rep. 183,

[McIntire vs. McLaurin.]

Justice Washington, after reviewing a number of cases on this branch of learning, says, the result of these cases is, that if upon a sale, with a warranty, or if, by the special terms of the contract, the vendee is at liberty to return the article sold, an offer to return it, is equivalent to an offer accepted by the vendor, and in that case the contract is rescinded and at an end, which is a sufficient defence to an action brought by the vendor for the purchase money, or to enable the vendee to maintain an action for money had and received, in case the purchase money has been paid, &c. But here there was not an offer merely to return; the property was returned and accepted by the vendor. See also the other cases referred to at the bar, and commented on by Justice Washington, 1 Term Rep. 123: 7 East, 274: 2 Taunton, 2, &c. We are of opinion, therefore, that the judgment of the Circuit court is correct and must be affirmed.

McINTIRE vs. McLAURIN, et als.

A promissory note was executed to James Shelton & Co. James Shelton assigned the note to McLaurin in his own name: Held, that such assignment did not pass the legal interest in the note to McLaurin. It should have been assigned in the firm name.

This is an appeal in error from the October term of the Circuit court of Lawrence county, 1840, J. H. Dew, special Judge, presiding. The facts upon which the cause was determined in the Supreme court are fully set forth in the opinion.

Neil S. Brown and Wright, for the plaintiff in error.

Combs, for defendants in error.

TURLEY, J. delivered the opinion of the court.

On the 11th day of July, 1838, McLaurin executed his bill single to B. & R. Sessums, for \$540, payable the 1st day of January following: this was assigned to the plaintiff McIntire by B. & R. Sessums on the 14th of June, 1839. On the 23d day of June, 1838, B. & R. Sessums executed their note to James Shelton & Co. for \$562, payable on the 1st of March following: this note

[Helm vs. Wright.]

was assigned by James Shelton individually, and not in the name of the company, to McLaurin on the 31st of May, 1839. The plaintiff, McIntire, sued McLaurin and B. & R. Sessums, on the note executed by McLaurin to the Sessums, and they set up the note executed by the Sessums to James Shelton & Co. and assigned by James Shelton to McLaurin as a set off, which was allowed by the court. To this, the plaintiff excepted, and has prosecuted his writ of error to this court. In the argument, several points are incidentally discussed, all of which, except one, we deem it unnecessary to notice, as that is conclusive upon the question and well settled. The note attempted to be used as a set off, was, as we have seen, executed to James Shelton & Co. and it was only assigned by James Shelton; this did not, either upon principle or authority pass the interest in the note to the assignee, and therefore he could not use it, as a set off. This question has been so well considered, and so often determined, that we deem it unnecessary to discuss it, and will merely refer to the authorities, 4 John. Rep. 224: Bailey on Bills, 40: Douglas, 653: 9 Mass. 334: Chitty on Bills, 8th American Edition, 66, 67: 15 East, 7: 2 Peters's, 186. The judgment of the Circuit court will, therefore, be reversed and the cause remanded for a new trial.

HELM vs. WRIGHT and GRAHAM.

1. It is the peculiar province of a court of Equity to rectify mistakes.
2. Where an obligor in a delivery bond by mistake acknowledged in the bond that the property therein set forth belonged to the defendant in the execution, when in fact it belonged to himself: Held, that the court had the power to reform such bond and to restrain the obligee in such bond from pleading it to the prejudice of the rights of the obligor.

On the 29th day of January, 1839, George W. Graham recovered three judgments before Willis Crutcher, a justice of the peace for the county of Williamson, against Benjamin C. Helm; one for the sum of \$140 81, another for \$125 69, and the third for \$160 90. These judgments were stayed according to the statute, by James Helm. On the 23d day of April, 1839, James Helm by reason of his own debts, and responsibilities for others, being in failing condition, executed a deed of trust to Thomas

[Helm vs. Wright.]

Helm to indemnify said Helm against losses and responsibilities incurred for him by Thomas Helm, on various notes, for about the sum of \$600. There did not seem to be any reasonable doubt about the good faith of this transaction. This deed was acknowledged on the 23rd day of April and registered on the 27th. At the expiration of the stay, executions were issued on said judgments and placed in the hands of William W. Wright, a constable of Williamson county, who levied them on the property set forth in the deed of trust, to wit, a wagon and five horses and harness, the principal being insolvent. This property was in the possession of James Helm at the time of the seizure by the constable. Thomas Helm asserted his claim to the property. Graham and the constable seemed to be aware of the fact that the property had been conveyed to Thomas Helm, by deed of trust. This created some squabbling in regard thereto. James Helm, however, was desirous of retaining the property till the day of sale, and desired that Thomas Helm should be his security for the delivery of it. Thomas Helm seemed to be in some doubt about it, but on being informed, that it could not affect his right to the property consented to enter into a bond for the delivery of the property on the day of sale.

Wright and James Helm procured one Miller to draw up a bond for the delivery of the property, which was signed by Thomas and James Helm, the condition of which, was in the following words:

"The condition of the above obligation is such, that whereas, on the 30th day of May, 1839, W. W. Wright, one of the constables of the county of Williamson, levied on the following described property of said James Helm, to wit, five head of horses and five set of gear, valued at \$600, to satisfy three executions which issued from judgments, which George W. Graham recovered against B. C. Helm, and James Helm, as stay before Willis Crutcher, one of the justices of the peace, for said county, on the 29th day of January, 1839.

"Now, if the said Thomas and James Helm shall deliver the said property on the 20th day of June, 1839, at the court house, in the town of Franklin, then this bond to be void, otherwise, to remain in full force and virtue."

Wright did not dictate the terms of the bond, and Miller, who drew it, knew of the existence of the deed of trust, and had no

[Helm vs. Wright.]

intention, as he alledges, to affect the right of Thomas Helm to the property by the phraseology used, and it does not appear, that Thomas Helm read the bond, or scrutinized its language.

The bond, thus executed, was delivered to the constable, and James Helm, on the day of sale appointed, delivered the property. Thomas Helm appeared and forbid the sale. It was, however, sold and the proceeds appropriated to the satisfaction of Graham's executions. Thomas Helm instituted an action of trespass against Wright and Graham, at the July term, 1839, of the Circuit court of Williamson county, for the recovery of damages for the seizure and conversion of said property. The defendants set out the delivery bond and pleaded it as an estoppel of the plaintiff's claim of right to the property therein specified.

On the 14th day of March, 1840, Helm filed this bill in the Chancery court at Franklin, Williamson county, setting forth his claim to the property by virtue of the deed of trust, setting out the delivery bond and alledging that the acknowledgment therein contained, that said property specified, was the property of James Helm, was made and signed by him through mistake, contrary to the truth of the fact, and without the slightest intention to affect his right to the property, and praying that the mistake in said bond should be corrected, or that the defendants should be perpetually enjoined from setting up the recital in said delivery bond in bar of plaintiff's right.

Wright and Graham filed their joint answer on the 24th of April, 1840, charging the deed of trust to be fraudulent, and alledging that the statement made in the bill, that the recital complained of in the bond, was made through mistake, was false. The complainant filed a general replication; and proof was taken exhibiting the facts to be as above set forth.

The cause came on for final hearing at the October term, 1840, before Chancellor Bramlett, who being of the opinion that there was no fraud practiced in the obtaining of said bond, and that "there was not such a mistake committed by the complainant in executing said bond as would authorize the interposition of a court of Chancery, in granting relief against said bond," dismissed the bill and ordered that each party pay his own costs, &c. Complainant appealed to the Supreme court.

J. Marshall, for complainant. A Court of chancery will reform

[Helm vs. Wright.]

deeds, when they do not carry out the intentions of the parties in making them. 1 Eng. Exch. Reports, 211. *Ball vs. Storie*, 1 Con. Eng. Ch. Rep. 106: 2 Johnson, Ch. Rep. 585: Jeremy's Eq. Jurisdiction, 367, 8, 9,—484, 491, 499: 1 Story's Eq. page 165: See 2 Sch. and Lef. 501, 2: 2 Vesey, Sr. 100: 6 Vesey, 333: 3 Yerger, 382: Cooke, 437: 1 Brown, C. C. 341: See also, 2 Story Eq. 187, 9: Eden on Inj. 407, *et Seq.* 1 Sch. and Lef. 428: Jeremy, 338, 343.

E. H. Ewing, for complainants, cited, 1 Story, 165, 167, 170.

GREEN, J. delivered the opinion of the court.

This bill is brought to reform a bond, executed by the complainant, for the delivery of property which had been levied on by a constable, on the ground of mistake, or to restrain the defendants from insisting upon it, in a suit, in a court of law, because of the occurrence of a mistake, whereby it was varied from the intention of the party by whom it was executed. The bond in which the mistake was alledged to exist, recites as follows, viz: "The condition of the above obligation is such, that on the day and date above written, W. W. Wright, one of the constables of said county hath levied on the following described property of the said James Helm," &c. The execution by virtue of which the levy was made, was against James Helm; and Thomas Helm, the complainant, claimed the property as his own. The delivery bond, was executed by both James and Thomas Helm. Thomas Helm claimed the property mentioned in the delivery bond as his own, both before and after the levy was made; and about the time the bond was executed he mentioned his claim, and said he would bring suit for it. Suit was brought by him, and the above recital in the delivery bond was pleaded as an estoppel. This bill is brought to reform the bond, and to restrain the defendants from insisting upon it, as an estoppel.

It is not denied, that a court of equity will relieve against mistakes. In Jeremy, Equity Jurisdiction, 268, it is said, "that the rectifying mistakes is the peculiar province of a court of Equity, and that parol evidence is admissible to assist the court in rectifying a mistake, not apparent upon the face of the deed." Judge Story, in his Equity Jurisdiction, vol. 1, page 167, says, "a court of Equity would be of little value, if it could suppress only posi-

[Helm vs. Wright.]

tive frauds, and leave mutual mistakes, innocently made, to work intolerable mischiefs, contrary to the intention of parties. It would be, to allow an act, originating in innocence, to operate ultimately as a fraud, by enabling the party, who receives the benefit of the mistake, to resist the claims of justice." There is no question, therefore, but that a court of Equity will relieve against a mistake of fact, when the words employed in an agreement, do not express the intention of the parties. But it is insisted by the defendants in this case, that here, there is no mistake of fact, but that the mistake, if any, is one of law; that the complainant conveyed in the bond, the idea he intended to convey; but that, if mistaken at all, it was as to the legal consequence, and not as to a fact stated.

If this proposition be true, the complainant cannot be relieved. For it is certainly true, that if the party intended to use the words in the sense which they really do convey, if the thought they express, was the idea he intended to communicate, there is no mistake of fact, but a mistake of the legal consequence, as, if a party release a joint obligor, although he may not intend thereby to release the co-obligor, and may be mistaken as to the legal consequence of the act, yet, there is no mistake as to the fact. He did intend to use the words in the release, in the sense they convey, but he intended it to be a release of one only. So here, if Thomas Helm intended to admit that the property levied on, belonged to James Helm, although he might not have intended thus to furnish matter, which would constitute a bar to his action, and as to such consequence, might be mistaken, yet such mistake could not be relieved against, because it would be a mistake of law, and not of fact.

But, in this case, the mistake was not as to the effect of the admission, but was, as to the fact admitted. The bond recites, that the constable had levied on the following property of James Helm, &c. Now, the thing admitted is, the fact of the ownership of the property. Whether James Helm was the owner of the property or not, was not a legal consequence from any fact stated, but was itself the fact admitted. The proof shows beyond all doubt, that the complainant could not have intended to state this fact. He had denied it previously to the levy, had asserted his ownership after the levy was made, and about the time he was executing this paper, declared his intention to sue. The mistake is therefore clearly proven, and is plainly a mistake of fact. The case of *Ball*

[Helm vs. Wright.]

vs. *Storie*, 1 Sim. and Stuart, 210, 1 Con.. Eng. Ch. Rep. 109, is analogous to this. By the memorandum inserted in the agreement, the defendant intended to become personally responsible for the £200 only, but it was so worded as to make him liable in addition for the £4000. The vice Chancellor said: "This is the common case of an instrument to be reformed in Equity, because the drawer, has by mistake, miscarried in the expression of the agreement of the parties."

In that case, there was no question but that the defendant read the instrument, and knew what it contained. But he inadvertently overlooked the import of the words: knowing he had agreed to be bound for the £200, he supposed, the agreement expressed his understanding. But he was mistaken, and although himself a lawyer, he was relieved.

In this case, the object of the contract was to deliver the property. The agreement to do so, was the matter to which the complainant's attention was directed. The recitations were deemed of but little importance, and very naturally, were not scrutinized. The oversight in the statement, inadvertently inserted in the bond by the draftsman, that it was the property of James Helm, would naturally occur, and we think upon reason and authority, ought to be relieved in this court. Let the decree be entered accordingly.

D E C R E E .

Be it remembered that this cause came on to be heard on this 27th day of January, 1841, before the Honorable Nathan Green, William B. Reese and William B. Turley, Judges, &c, upon the record of said cause from the chancery court, embracing bill, answer, exhibits, replication and proof, whereupon and upon argument of counsel, it appearing to the court that in executing the delivery bond in the pleadings mentioned, the said Thomas Helm made a mistake of fact, by inserting therein contrary to his intention, the words, "the property of James Helm," an admission that the property in the delivery bond was the property of James Helm, when he was himself claiming and insisting on his right to the same: and it appearing to the court that it would be improper and unjust to permit said recital, so made by mistake, to be used as an estoppel to the prejudice of said Thomas Helm, in suits pending, or to be brought by or against him, and it appearing that said Thomas Helm has brought suit in the circuit court of Williamson

[Peek vs. The State.]

county for damages, for selling said property, against Wright and Graham, and that they have set up or are about to set up said recital as an estoppel; it is therefore ordered and adjudged and decreed, that the decree of the chancellor be reversed; that said delivery bond be reformed and corrected in the matter of mistake aforesaid, and that the words "the property of James Helm" be stricken therefrom, and that said defendants Wright and Graham be enjoined from setting up said recital in said delivery bond as an estoppel in said suit. And it is further ordered that the complainants pay the costs of this cause in this and in the Chancery court, and that execution issue for the same as at law.

PEEK vs. THE STATE.

1. An indictment charging the defendant with having passed counterfeit "dollars," describes with sufficient certainty the character of coin counterfeited. It is not necessary that it should show that it was a Spanish or Mexican dollar or a dollar of the United States. The species of coin must be described; nothing more.

2. The 39th section of the act of 1829, ch. 23, declares it to be felony in any one, to make fraudulently any coin in imitation of the current coin of the State: Held, that an indictment under this section charging the defendant with fraudulently making coin to the likeness and similitude of the current coin was good. Where the words used in the indictment are equivalent to, or of more extensive signification than those used in the statute, such words are sufficient.

3. Where an offence at common law was a misdemeanor, and has been raised by the act of 1829, ch. 23, to the grade of felony, the indictment need not charge that the act was done feloniously; the 72d section of said act, having declared indictments framed according to common law form, good and valid to sustain a conviction under said statute.

4. Evidence that the defendant had passed other counterfeit coins at other times, either before or after the offence for which he was indicted is admissible, to show that he knew the money passed by him in the particular case was counterfeit money. Such evidence is, however, a departure from the general rule, that proof of an offence not charged in the indictment shall not be heard; and, therefore, if the counterfeit coins alledged to have been passed at another time are not produced on trial so their baseness could be fully established, the proof that they were counterfeit should be positive and direct, so far as the knowledge and belief of a witness would go.

5. If incompetent evidence has been received, the court will award a new trial to the defendant in a criminal case, though it may appear to the court that the verdict of the jury is correct. The contrary rule has never prevailed in this State.

At the June term, 1838, of the Circuit court of Overton coun-

[Peek vs. The State.]

ty, the grand jury returned a true bill against James Peek, in the following words:

“The Grand Jurors of the State of Tennessee, sworn and charged to enquire for the body of the county of Overton, in the State aforesaid, upon their oaths, present that James Peek, yeoman, on the first day of February, 1838, with force and arms, in the county of Overton, in the State of Tennessee, fifty pieces of false, forged, fraudulent, base, adulterated and counterfeit money and coin of pewter, lead, tin, copper, steel, iron and other mixed metals to the likeness and similitude of the good, legal and current money of the State of Tennessee, called dollars, then and there falsely, deceitfully and fraudulently, did forge, counterfeit and coin, against the form of the statute in such case made and provided, and against the peace and dignity of the State. And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that the aforesaid James Peek, yeoman, afterwards, to wit, on the said 1st day of February, 1838, with force and arms, in the county of Overton, in the State of Tennessee, fifty pieces of false, fraudulent, counterfeit, base and adulterated coin to the likeness and similitude of the good, legal and current money and silver coin, current in the State of Tennessee, called dollars, as and for pieces of such good, legal and current money and silver coin, called dollars, then and there did deceitfully utter, tender and pass to one Edward N. Cullom; he the said James Peek, yeoman, at the time he so uttered, tendered and passed the said fifty pieces of false, fraudulent, base, and counterfeit money and coin, well knowing the same to be false, fraudulent, forged, base and adulterated and counterfeit, against the form of the statute in such case made and provided, and against the peace and dignity of the State.”

The defendant pleaded not guilty to this indictment, and issue was joined upon the plea. The cause was continued till the June term, 1839, at which time a jury was selected and the proof submitted to them, and not being able to agree on a verdict, a mistrial was entered by consent of parties. The cause was subsequently continued until the June term, 1840, when it was again submitted to a jury of Overton, the Honorable A. B. Caruthers presiding.

Edward N. Cullom, a witness on behalf of the State, testified that he was clerk and master of the chancery court at Livingston, in the county of Overton, and that by virtue of a decree in the chancery court at that place, he was directed to sell, and did sell

[Peck vs. The State.]

certain lands and town lots, lying in the county of Jackson, and that the defendant James Peek became the purchaser of a tract of land for the sum of twelve hundred dollars; that the sale was completed about three o'clock, and the decree directed that the purchase money should be collected in gold and silver. Witness told the defendant that he must come over to the inn and pay up the money, as he wished to leave. The defendant, however, did not come, alledging that he did not wish to be carrying about a large sum in silver in the day-time. The payment was, therefore, postponed till after supper at candle-light. The peculiar brightness and newness of a portion of the coins offered induced the witness to suspect their genuineness. Witness expressed his fears on this point to the defendant, who, thereupon, told him that the money had not been in circulation, but had latterly been drawn from bank.

The witness then called upon some individuals, with a view to have their opinions; they expressed the belief that it was good money, and he accordingly took of them seventy-two new bright dollars, all of which afterwards turned out upon fuller examination to be counterfeit. The money was produced on the trial and its baseness fully established. Other witnesses testified that he had borrowed from them Spanish milled dollars, of an old and dark appearance, to pay a part of this debt, and had given them new bright dollars, which were subsequently returned.

Thomas L. Bransford testified that he had possession of a part of this money, that its appearance had induced suspicions of its genuineness—that it was of the thickness and circumference of good money, but that it was deficient in weight, thirty dollars of it lacking \$2 62½ in weight, and that in his judgment a deficiency in weight, was the most invariable indication of counterfeit coin.

Loftis, a witness on behalf of the State, testified, that after Peek had passed the money to Cullom for which he was indicted, he went to him to borrow some money, and that Peek told him he could get it. Peek then asked Loftis if he had any old Spanish milled dollars; Loftis told him he had fourteen "flat heads:" Peek took them and gave him in exchange therefor fourteen more, purporting to be silver, seven old, and seven new bright looking dollars, resembling in appearance those passed to Cullom. Witness weighed them in scales, and found them deficient in weight. They were suspected of being counterfeit, by himself and neighbors, and

[Peek vs. The State.]

returned to Peek, who took them and gave him other money in their stead.

The testimony of this witness was objected to by the defendant, but his objection was overruled, and the testimony admitted to go to the jury.

The defendant introduced a witness who testified that he saw the defendant get one hundred dollars in silver from a Kentuckian on the highway, and gave him in exchange therefor, one hundred and five dollars in notes of the Commonwealth's bank of Kentucky, about the time he passed the money to Cullom.

The jury rendered a verdict of guilty against the defendant, and fixed his term of imprisonment in the jail and penitentiary house of the State at three years.

The defendant moved the court to set aside this verdict. The court overruled the motion. The defendant also moved to arrest the judgment of the court, which was also overruled and judgment rendered in conformity with the verdict. The defendant appealed in error to the supreme court.

James Campbell and S. Turney, for plaintiff in error. The evidence of Loftis was inadmissible. The principle, that proof of a crime not charged in an indictment shall be admitted to sustain the crime actually charged, is an anomaly in the science of evidence, and an absolute departure from all those rules formed by the wisdom of ages for the protection of the innocent against surprise. How is it possible that the defendant should be prepared to rebut charges of distinct crimes not alledged in the indictment, when no notice whatever is given of the intended introduction of such proof? They admitted that some adjudicated cases could be produced which admitted such testimony, but the correctness of such adjudications was doubted by able judges, and none were disposed to extend the application of the rule. The testimony of Loftis in this instance is introduced for the purpose of proving the guilty knowledge of the defendant in the uttering and passing of the counterfeit coins, or in other words, that the fact that he had passed counterfeit coins at one time, was evidence that he passed other coins at a different time, with guilty knowledge. He contended that Loftis's testimony did not prove a crime in passing the money to him; his testimony was deficient in this respect in two particulars. 1st. It does not prove conclusively that the coins passed to

[Peek vs. The State.]

Loftis were counterfeit. He merely suspected that they were counterfeit and returned them. 2nd. Loftis does not prove that the coins passed to him were passed with a knowledge that they were counterfeit, consequently they would furnish no proof of guilt as to the passing to Cullom. Loftis's testimony, therefore, was clearly inadmissible.

2. The indictment does not describe the offence in the words of the statute. It does not aver that the defendant did make fifty pieces of base and adulterated coin, called dollars, "in imitation" of any coin current in the State of Tennessee. It omits these words of the statute altogether, and avers that the coins were forged "to the likeness and similitude" of the good current coin of the State of Tennessee. It is submitted whether in an indictment founded on a statute creating a felony, the State can depart altogether from the important and operative words of such statute, and substitute what the officer of the State may please to call synonymous words, or expressions conveying the same idea. This cannot be done. 1 Ch. C. L. 282, 286, 287, 288: 2 Mass. 131: *Commonwealth vs. Morse*, 2 Burrow, 1037.

3. This offence is expressly declared a felony by the act of 1829, ch. 23, sec. 1, and yet it is not charged in the indictment to be a felony. The word feloniously is omitted. This word is a descriptive word in the charging of all felonies, whether by statute or by common law. Arch. 50, third Am. Ed. Though the grade of this offence may have been raised from a misdemeanor to a felony by the act of 1829, ch. 23, sec. 1, yet as the statute declares it a felony, it should be described as a felony. The 72d section of the act certainly could not have been intended to supersede its own provisions, so far as to make an indictment for a misdemeanor at common law, good as an indictment for felony.

4. The indictment does not specify whether the coin alledged to have been counterfeit, was made in imitation of the current coin or dollar of the United States, or foreign dollar or coin current by law in the United States. There are several kinds of dollars current in the United States. 1st. The dollar of the United States; 2d. The Spanish milled dollar; 3d. The Mexican dollar; 4th. The Peruvian dollar. The indictment should have specified which of these descriptions of coins were counterfeited. The species of the coin should be set forth in the indictment. Archb. 53, Am. Ed.

5. By the 39th section of the act of 1829, ch. 23, "the fraudulent

[Peek vs. The State.]

making of any coin in imitation of any coin current in this State by law or by usage," is a penitentiary offence, &c. There are coins current in this State by law and by usage both, yet this indictment does not specify whether the coin counterfeited was coin current by law or by usage. This indictment is too vague and indefinite. In England they have one statute prohibiting the counterfeiting the King's coin; this is one offence. They have another statute to prohibit the counterfeiting foreign coin current in the realm; this is another and distinct offence. Our statute is in substance the same as the English law, except it combines in one act, and in one clause of that act, the two offences, and prescribes the same punishment. But certainly this was not intended to interfere with that rule which requires certainty in the description of offences; certainly this was not intended to dispense with the giving notice by the allegations of the indictment to the defendant, whether he should come prepared to defend himself against a charge of forging dollars, current by law, or those current by usage.

Attorney General, for the State.

GREEN, J. delivered the opinion of the court.

The defendant was indicted in the Overton circuit court, for passing counterfeit coin. The second count, of the indictment, charges, that "the said James Peek, on the said 1st day of February, 1838, with force and arms, in the county of Overton, in the State of Tennessee, fifty pieces of false, fraudulent, base and adulterated coins, falsely and fraudulently made and counterfeited to the likeness and similitude of the good, legal and current money and silver current coins in the said State of Tennessee, called dollars, as and for pieces of such good, legal and current money, and silver coins, called dollars, then and there, falsely, fraudulently and deceitfully, did utter, tender and pass to one Edward N. Cullom, he the said James Peek at the time he uttered, tendered and passed the said fifty pieces of false, fraudulent, base and adulterated counterfeit money and coins as aforesaid, then and there, well knowing the same to be false, fraudulent, forged, base, adulterated and counterfeit, against the form of the statutes," &c.

The offence charged in the above indictment, is made felony by the act of 1829, ch. 23, sec. 39. The words in the act, in defining

[Peek vs. The State.]

the offence, are as follows, viz: "No person shall make, or begin to make, prepare or complete, or begin to prepare or complete any base or adulterated coin, in imitation of any coin which may be current in this State, either by law or usage. No person shall fraudulently pass or offer to pass any such base or adulterated coin."

1. The first point insisted on by the counsel for the plaintiff in error is, that the offence is not charged in the indictment with sufficient precision and certainty; because the word "dollar" used in the indictment, may mean, a Spanish dollar, a Mexican dollar, or a dollar of the United States; to pass either of which, would constitute an offence distinct from that which would be committed by passing one of either of the other description. It is certainly true, that an indictment must state all the facts and circumstances, that constitute the offence, with such certainty and precision, that the defendant may know whether they constitute an indictable offence or not, in order that he may know how to plead, and how to prepare his defence; and that there should be no doubt of the judgment that should be given, if the defendant be convicted. Arch. Cr. Plead., 42-3: *Rex vs. Horne*, Cowp., 675. Therefore, money is described as so many pieces of the current gold and silver coin of the realm. The "*species*" of coin must be specified. Arch. Cr. Pl. 50. As if it be a "*sovereign*," a "*guinea*," or a "*shilling*," the indictment must so describe it. But it is not necessary to describe the devices upon the pieces of forged coin; it is sufficiently certain if it be described as the King's current gold, called a "*sovereign*," (Archb. Cr. Pl. 387,) because the word "*sovereign*" conveys a distinct, definite idea of a particular species of coin: whether, therefore, it bear the "likeness" of William the fourth or Victoria, is immaterial, and would not contribute to any of the great ends for which certainty is required. So in the case now before us, the indictment describes the "counterfeit coin" as "dollars." And whether they be coins of the United States, or of Spain, or Mexico, they are equally current in this State, of the same appearance, and value, and the word applies as well to the one as to the other, and conveys the same definite idea of each. The devices upon them are somewhat different, but scarcely more so than an English shilling coined in the reign of William and Mary, and one coined in the reign of Victoria.

But it is said, the offence is different; not different it may be re-

[Peek vs. The State.]

plied, in any other sense than the passing the counterfeit resemblance of two different English shillings would be. Our law puts the passing the counterfeit resemblance of all coin, current in the State, upon the same footing. The "*offence*," therefore, is the same in criminality, and in punishment. The *difference* is only such as will distinguish one dollar from another by the devices upon them. But as that is immaterial in other coins of the same species, we see no reason why we should hold it to be material in this case, merely because these *dollars* are coins of different countries. The dollar of Spain, Mexico and the United States, are of the same species: they are of the same value, and of the same general appearance; and in reference to them, the word "*dollar*," conveys the same general idea.

2. It is next objected, that the indictment does not pursue the words of the *statute*. The statute says, no person shall make coin in *imitation* of the coin current in the State, or pass the same. The indictment omits the words "make in imitation," and uses the words, made to the "*likeness and similitude*" of the current coin, &c.

It is true, that where a statute creates an offence, the indictment itself must charge the facts and circumstances which constitute the offence as mentioned in the statute. And it is better to pursue strictly the words of the statute, as it precludes all question about the meaning of the expressions used. Arch. Cr. Pl. 53. But where a word, not in the statute, is substituted in the indictment, for one that is, and the word thus substituted is equivalent to the word used in the statute, or is of more extensive signification than it, and includes it, the indictment will be sufficient. Arch. Cr. Pl. 52. As in the cases put in the books, where the word "*knowingly*" in the statute, was represented by the word "*advisedly*" in the indictment, or the word "*wilfully*" in the statute, by "*maliciously*" in the indictment. In these cases the indictments were good, because the words substituted were equivalent to those in the statute, or of more extensive signification. In the case now before us, this rule applies. The word "*imitation*" in the statute, is represented in the indictment by the words *likeness and similitude*. Now these words certainly are of more extensive signification than the word "*imitation*," and, therefore, do not, by their substitution, vitiate the indictment.

3. The next objection is, that the word "*feloniously*" is omitted in

[Peek vs. The State.]

the indictment; and it is certainly true, as a general rule, that an indictment for a felony, whether at common law or by statute, the word "*feloniously*" must be employed. Arch. Cr. Pl. 59. But the 72d section of the act of 1829, ch. 23, declares, that "all indictments for offences enumerated in this act, which are offences at common law, shall be good, if the offence be described or charged according to common law, or according to this statute." The facts, which constitute the offence charged in this indictment, were an offence at common law, and although not of the same grade that the statute creates, still we understand the words of the above recited section to embrace the case. It does not confine the provision, that the common law indictment shall be good, to cases which were felonies at common law, nor do we suppose that it was so intended. The purpose of the legislature seems to have been to cut off all ground for cavil about mere forms, provided the party charged with the offence, were distinctly notified by the indictment of the nature of the accusation. So that if the facts which constitute an offence, be one by the statute and by the common law, an indictment, charging these facts, in the words used in the common law form, or in the words of the statute, shall be good.

4. The next objection is taken to the admissibility of Loftis's testimony. The evidence of this witness was introduced to prove that the prisoner at another time than that charged in the indictment, passed other counterfeit coin; and that to establish the guilty knowledge, that the coin charged in the indictment to have been passed, was counterfeit. Loftis says that he went to Peek, the defendant, to borrow money; defendant told him he could get it, and asked witness if he had any old Spanish milled dollars. Witness said that he had fourteen "flat heads." Peek got them of witness, and gave in exchange fourteen more, purporting to be silver; seven old and seven bright new looking ones, resembling in appearance, the money passed to E. N. Cullom. The same bright new dollars were weighed by witness in scales and found wanting in weight; were suspected of being counterfeit by witness and neighbors, and returned to Peek, and were taken back and other money placed in their stead. This evidence was objected to at the time, but the objection was overruled. There is no doubt, but that evidence, that other counterfeit money was passed by the prisoner at other times, either before or after the offence for which he was indicted, is admissible, to show his guilty knowledge in the particular case.

[Peck vs. The State.]

Russ. on Cr. 86: Roscoe, Ev. 68. If a party charged with passing counterfeit money, has frequently passed other counterfeit money, especially, if it be of the same kind, it furnishes a strong presumption, that he knew it to be counterfeit. The accidents of trade can hardly be supposed to have placed in his possession so much spurious money; and if it be of the same kind, the presumption is greatly strengthened, because it indicates that he is a dealer in the article. But we are of opinion, that in order to render this evidence admissible, it must be proved that the money so passed was counterfeit. Roscoe, Ev. 68. It is not enough that there should be suspicion merely. If the coins or notes thus passed at another time, are not produced at the trial, so that, whether they are counterfeit or not, may be clearly established, the proof that they were counterfeit (so far as the belief and knowledge of the witness can go,) ought to be direct and positive. If such proof be not required, a man's reputation and liberty might be endangered by the vague suspicions of every person with whom he had dealt, and to whom he had paid money for a series of months, without the possibility of defending himself. The suspected money is not produced, so that its genuineness may be established, and the suspicion counteracted—and suspicions of witnesses, not amounting to belief, nor creating an *opinion* on their part, that such other money was counterfeit, is made the means of creating in the minds of the jury, the belief (not entertained by the witness himself,) that the prisoner is guilty.

It is contrary to the general rules of evidence, that proof of a transaction not charged in the indictment should be received at all. The certainty required in an indictment, is intended to give the party distinct notice of the facts charged against him, and to put him upon his defence. To permit evidence, therefore, of facts "not charged" in the indictment, would seem inconsistent with this view, because the party is not advised, by anything in the proceedings against him, that such facts are to be proved, until he hears the evidence on his trial. Hence such evidence is not allowable, except in cases where guilty knowledge constitutes the gist of the offence; and this from the necessity of the case. But it would be extremely dangerous to carry this exception to the general rule farther than it has gone; and that is to require *proof* that the money which was passed at another time was counterfeit. By *proof* we do not mean, that the coins must be assayed by one skilled in that art,

[Woodfolk vs. Sweeper.]

or that bank notes must be proved by the *bank officers* to be counterfeit, but the witness must be convinced of the fact, if the evidence depend upon *opinion* or if upon *facts* stated by him, they must be such as to establish the fact, that the money was counterfeit. This we think was not the character of Loftis's testimony, and, therefore, are of opinion, that it was improperly received by the court below.

5. The rule insisted on by the *Attorney General*, that although incompetent evidence was received, yet if the court see that there was enough, independent of such evidence, to convict the prisoner, it will not disturb the verdict, does not prevail in this State. It has been uniformly held here, that if incompetent evidence has been received, that *might* have influenced the jury, a new trial will be awarded; for it cannot be seen how far such evidence did influence them, and we cannot say that the prisoner has been convicted by a jury of his peers, on evidence competent for that purpose. Reverse the judgment.

WOODFOLK vs. SWEEPER.

1. When an action is brought to recover freedom, none but nominal damages can be recovered in such suit.

2. A second action is necessary to recover damages for the wrongful imprisonment of a freeman as a slave, and for the necessary expenses incurred in the recovery of his freedom.

3. Where the circuit judge charged the jury that P. S. was *entitled* to recover as damages, the value of his services during the time he was wrongfully imprisoned, necessary witness and attorney's fees, &c: Held that this was erroneous, in leaving the jury no discretion as to the amount of damages; these were legitimate matters to be considered of by the jury in forming their verdict, but the plaintiff was not as a matter of legal right entitled to them.

Peter Sweeper instituted an action of trespass, *vi et armis*, on the 24th day of January, 1839, in the circuit court of Jackson county, against William Woodfolk. At the March term, 1839, plaintiff filed his declaration, in which he averred that the defendant on the — day of December, 1832, in the county of Jackson, did commit an assault and battery on the body of the plaintiff, imprisoned him, reduced him to the condition of a slave and com-

[Woodfolk vs. Sweeper.]

pelled him to labor for the plaintiff after the manner of a slave, from the said —— day of December, 1832, until the —— day of February, 1835; that he, the said defendant, appropriated the entire proceeds of the labor of the plaintiff, to his own use and benefit, contrary to the will of the plaintiff, and that such services were reasonably worth the sum of seven hundred dollars. The plaintiff further averred, that by reason of his being so detained in prison and slavery, he was compelled to expend large sums in prosecuting suits for the recovery of his freedom, to wit, attorney's fees, witness-fees and other necessary expenses, amounting in the whole, to the sum of \$500, which said several sums the defendant had refused to pay to the plaintiff to his damage —— dollars. The defendant pleaded not guilty, and other pleas not necessary here to be set forth. Issue was joined on the plea of not guilty.

The cause was continued till the January term, 1840, at which time it was submitted to a jury of Jackson county, upon the following facts: It appeared that Peter Sweeper was black, that he was born of a free black woman, in Baltimore county, in the State of Maryland, and that he was indicted and convicted, in the year 1826, in the said State and county aforesaid, of persuading and conveying slaves out of the State of Maryland into the State of Pennsylvania, and sentenced according to the laws of that State, to be "banished by sale and transportation for the term of seven years;" that he was accordingly sold by the Sheriff of Baltimore county to the highest bidder; that he was in the same year, 1826, purchased by Joseph Woodfolk, and by him conveyed to the State of Tennessee, and deposited with the defendant in 1827; that the term for which plaintiff was sold, expired about the close of the year, 1832. Woodfolk held him as a slave till the year 1835, and it does not appear that he had any knowledge of the plaintiff's being a freeman further than he might have derived such knowledge from the occasional assertion of such claim by the plaintiff. It also appeared, that on the 7th day of September, 1835, Sweeper instituted an action of trespass, *vi et armis*, in the circuit court of Jackson county, against W. Woodfolk for the recovery of his freedom; that the plaintiff employed Hubbard and McLain, attornies, to prosecute his rights; that the suit was laborious and expensive; that the depositions were procured at much trouble and cost from the State of Maryland; that a witness was brought

[Woodfolk vs. Sweeper.]

from said State to the State of Tennessee, the distance being eight hundred miles, to testify in the cause in regard to identity of plaintiff; that the plaintiff filed his bill in the chancery court at Carthage to enjoin the defendant from removing him from the State during the pendency of the suit at law; that he recovered a judgment for his freedom in the suit instituted on the 7th September, 1835, as aforesaid; that there was an appeal from this judgment to the supreme court, where it was reversed and remanded for a new trial; that the plaintiff again recovered a judgment, from which the defendant again appealed to the supreme court, where the said judgment was on the 6th day of December, 1838, finally affirmed. It appeared from the proof that the services of the attorneys were estimated at \$150 for the suit at law, and \$25 for the suit in chancery. The other items of charge were submitted specifically to the jury.

The presiding Judge, A. B. Caruthers, amongst other things charged the jury that the plaintiff was *entitled* to recover as damages; 1, the value of his services for the time that defendant wrongfully held him in bondage; 2, the expenses he necessarily incurred in recovering his freedom; that a reasonable allowance should be made for the plaintiff's attorneys fees; that the item for the witness who travelled from the State of Maryland to identify him as the same person who had been punished for crime and sold to Joseph Woodfolk for six years, was not allowable unless it should clearly appear from all the circumstances that surrounded the plaintiff, that it was necessary to procure that testimony in that way; but that if the jury should be of opinion that it was necessary to incur that expense, that it was allowable.

The jury rendered a verdict for the plaintiff, for the sum of \$743 30, in damages. The defendant moved the court to award him a new trial, which motion was overruled, and defendant appealed in error to the supreme court.

W. A. Cook, for plaintiff in error.

Can this action be sustained? The defendant in error relies upon the case of *Matilda vs. Crenshaw*, and if that case be correctly determined, it settles this point in the affirmative. This question being one of great importance in the slave-holding States, and of very frequent occurrence, and that decision leading to much litigation and to the great injury of innocent holders of supposed

[Woodfolk vs. Sweeper.]

slaves, a dispassionate reconsideration of the question is respectfully asked.

That decision cannot be sustained either upon principle or authority; most clearly it cannot be sustained on principle. This action and the action for freedom are both actions of trespass, *vi et armis*, and for false imprisonment. Two successive actions cannot be sustained for the same thing. But it is said that in the action for freedom nominal damages can alone be recovered and that this is to be assimilated to an action of ejectment. No authority is cited and no reason given, going to show, that if entitled to recover damages at all, the claimants could not recover them in the first action. It is said we borrowed the form of action from our sister States, especially Virginia, where the same practice prevails. The case of *Pleasants vs. Pleasants*, 2 Call, 319, is referred to as supporting the position assumed. That case, when looked into will be found to sustain exactly the opposite doctrine. Judge Roane, in delivering his opinion, with which the whole court concurred, uses this strong language: "I believe no instance can be produced, of profits being adjudged to a person held in slavery on recovering his liberty. Among a thousand cases of palpable violation of freedom, no jury has been found to award, and no court has yet sanctioned a recovery of the profits of labor during the time of detention." See page 343.

In the case of *Samuel Scott vs. Joseph Williams*, 1 Devereaux's Reps. 376, trespass and false imprisonment for freedom, the court charged the jury that they might give more than nominal damages and a verdict was rendered with substantial damages, and upon appeal to the supreme court, the judgment was affirmed. This case was not brought to the mind of the court in *Matilda vs. Crenshaw*. This is a distinct authority, that whatever damages the plaintiff is entitled to receive, he can recover in the first action.

The only question in that case was, whether the plaintiff was entitled to recover any damages at all, the defendant being a *bona fide* possessor, and *Pleasants vs. Pleasants*, was referred to, to sustain the defence. The court say, there were circumstances in the case, going to show a wilful holding in bondage, and the jury having a discretion in that case to give damages, they would not set the verdict aside. This case establishes the converse proposition to that assumed in *Matilda vs. Crenshaw*, that nominal damages, only, can be recovered in the action for freedom.

[Woodfolk vs. Sweeper.]

The case of *Phillips vs. Green*, 9 Louisiana Rep. 208, *Wheeler on Slavery*, 409, establishes the same point as *Scott vs. Williams*, and *Queen vs. Ashton*, 3 Harris and McHenry's Maryland Rep. 440, is *ad idem*. The only controverted point in all the authorities is, whether any but nominal damages can be recovered in any case; some holding that nothing more can be recovered in any case, and others that where the detention was wilful and knowingly wrongful, substantial damages might be given, if the jury thought proper to do so.

No case of a second action has ever been sustained or contended for before *Matilda vs. Crenshaw*: it stands isolated and alone. It is attempted in *Matilda vs. Crenshaw*, to liken trespass *vi et armis* to recover freedom, to the action of ejectment; but it is admitted that no similarity exists between the two upon the modern system of ejectment, that action being a mere fiction, shaped with the sole view of trying the title and not applicable to the recovery of the mense profits. The declaration is not framed with that view; the lease entry and ouster are all confessed, and it is agreed that title alone is to be put in issue. Before the modern fiction the rents and mense profits were recovered in the ejectment suit, *Tillinghast's Adams*, 328. In the action for freedom there is no fiction, there is no confession or agreement to insist on title alone. It is like the action for trespass on land which, tries the title as well as the ejectment, and yet it is a bar to the action for all mense profits anterior to the verdict. *Adams id.* 328, 1 McCord's Rep. 264.

2. If the action can be sustained, can hire for time before the commencement of the action be recovered. The case of *Matilda vs. Crenshaw*, decides it correctly. The court say the judgment in the freedom suit will only relate to its commencement, and estop the defendant to that time; if wages and damages for previous time and for previous abuses are claimed, the controversy will again result in one of title, in which case he had just determined the court could decide nothing but the question of freedom, and accordingly decided she was only entitled to recover hire from the commencement of the freedom suit. The court was necessarily driven to this conclusion, by the position assumed, that the question of damages could not be tried with the question of title. For it is admitted that the recovery of freedom is no evidence of the freedom before the bringing of the suit. In the case before the court

[Woodfolk vs. Sweeper.]

Sweeper was taken out of Woodfolk's possession at the commencement of the freedom suit, and according to *Matilda vs. Crenshaw*, he can recover no hire in this suit. The charge of the Judge below, that he was entitled to recover the previous hire, should be reversed.

3. Can counsel fees and other monies expended, be recovered in the suit? The case of *Matilda vs. Crenshaw*, sustains this claim, but it is contended that there is no case, English or American, warranting such a decision. Adams, on Eject. 332, is referred to as supporting this decision. That author simply states that the costs in the ejectment suit may be stated in the declaration for mense profits and recovered. And why is that the case? Simply because in the ejectment case the lessor of the plaintiff does not recover his costs so as to have an execution therefor. But by our law, even in an ejectment, the lessor recovers his costs; they are taxed and he has his execution for the same. So in the freedom suit, Sweeper recovered his costs, and they have been paid to the Sheriff; he does not ask for them, but for counsel fees and monies paid a witness for travelling expenses. Has such a claim ever been sustained even in a court for mense profits? No case can be found in which it is so held. Adams on Eject. 301, 1 Lof. Rep. 358, *Doe vs. Davis*. A decision of this case, in favor of the plaintiff, will lead to most serious, and in many cases, ruinous consequences. If hire can be recovered before suit and in a separate action, it may be recovered for fifty years, for no limitation will be on it. Two sets of costs must in every case be paid, witnesses may be sent for from different States and at distant points, and they will be proven to be necessary in the freedom suit, and it will be impossible to show that they were not necessary. Then attorney's fees will be added and the damage suit will be far more important and destructive than the suit for freedom.

If you confine them to one action, all this inconvenience will be cut off. Why should they recover attorney's fees and travelling expenses of witnesses in this suit, when other men cannot recover them? Why place the free negro on higher grounds than the citizens of the country? Why should not a man in the case of debt, assumpsit and covenant, assault and battery, &c. recover counsel fees and the money paid witnesses for attending from distant States and Governments. As to vindictive or increased damages

[Woodfolk vs. Sweeper.]

they can be recovered in the freedom suit as in every other case of trespass: why allow them in this case to bring a second action?

J. Campbell, for defendant in error, contended that the questions involved in this case were fully and directly decided by the adjudications of this State; that they had been adopted by the profession with entire satisfaction, and had worked no inconvenience in practice. He saw no reason why they should be disturbed. The facts in the record fully sustained the verdict of the jury.

TURLEY, J. delivered the opinion of the court.

This is an action of trespass brought by Peter Sweeper, a free man of color, to recover damages against William Woodfolk for having wrongfully detained him in slavery. Peter Sweeper brought his action of trespass to recover his freedom, against said Woodfolk, on the 7th day of September, 1835, and finally succeeded in gaining it on the 6th day of December, 1838. After thus establishing his right to freedom, the present action was brought, and prosecuted to a judgment for the sum \$743 30, at the November term, 1839, of the circuit court of Jackson, to reverse which, this writ of error was brought. In the charge, the court say to the jury, "that the plaintiff is entitled to recover as damages, 1st the value of his services for the time the defendant wrongfully held him in bondage; 2ndly, the expenses necessarily incurred in recovering his freedom; a reasonable allowance is to be made for his attorney's fees," and it is insisted by the counsel for the plaintiff in error, 1st, that none but nominal damages can be given in the case of a suit for freedom; 2ndly, that if more can be given, it ought to have been done by the jury in the suit brought to establish the right to freedom, and that no second suit can be brought therefor, and 3dly, that the charge of the judge is erroneous. Upon the first point the counsel cites and relies upon the case of *Pleasants vs. Pleasants*, 2 Call. Rep. 219. That was a case of proceeding by bill in chancery, by a man of color, to establish a right to freedom; a decree for profits was asked on the part of the complainant, upon which judge Roane said: "The decree for profits, is, I think, new and unprecedented; besides the account, when the reduction for the trouble and expense of taking care of the aged and infirm, and for rais-

[Woodfolk vs. Sweeper.]

ing the children is made, would probably yield very little; under every point of view, therefore, I am against the account."

We think this view of judge Roane is correct; we agree with him; that profits for the time a free man of color has been wrongfully held in slavery, is not the subject matter of account; they arise out of a tort, sound in damages, and can only be recovered by an appropriate action. A man may establish his right to freedom, by bill in equity, but must recover damages for his false imprisonment by action of trespass. In the case of *Scott vs. Williams*, 1 Dev. N. Carolina Rep. 376, the jury gave more than nominal damages, and the court of errors and appeals refused a new trial, saying that the jury had a discretion to do so, under the circumstances of the case. The 2nd point involves a mere question of practice, and as we find it, we will leave it. The courts of different States may fix it differently, according to what is believed to be the best mode of proceeding. In North Carolina, in the case just referred to, damages other than nominal were given by the jury, in the suit brought to establish the right to freedom, and judgment was given for them. In Virginia, in the case of *Coleman vs. Dick and Sal*, 1 Wash. Rep. 233, the court of appeals held that different persons may unite as plaintiff's in an action of trespass to try a right to freedom, although, in common cases of personal tort they cannot, for the court says, such actions are merely fictitious and are very properly in this respect likened to actions of ejectment; and if many persons may unite as plaintiff's, to try a joint right to land, no good reason can be given why they may not unite to try a joint right to freedom. The same principle of practice is established by the supreme court of Tennessee, in the case of *Harris vs. Clarissa*, 6 Yer. Rep. 227.

In the case of *Matilda vs. Crenshaw*, 4 Yer. 299, it is held that the consequence of considering a suit to try the right to freedom merely fictitious, and in the nature of an action of ejectment, is, that merely nominal damages are recovered, and that a second suit must be brought to recover the actual damages, to which the first cannot be plead in bar. We are satisfied with this case, we see no reason for changing the practice, but on the contrary, believe it to be greatly better, than to mingle up in one suit a contest for the right of liberty, and damages for a violation of it.

On the 3d and last point, we are of opinion with the plaintiff in error. We think the court erred, in saying to the jury that the

[Planters' Bank vs. Tappan.]

plaintiff was *entitled* to recover as damages the value of his services for the time he was wrongfully imprisoned, the necessary expenses incurred in recovering his freedom, and a reasonable allowance for his attorneys fees. The error consists in the use of the word "*entitled*," which imports a legal right, and leaves the jury no discretion as to the amount of damages, but really makes it a matter of account, which we have just said, it cannot be. It must stand like all other cases of like kind, subject for the amount of damages to the discretion of the jury. It was proper in evidence to show the time plaintiff was falsely imprisoned, the value of his labor, the expenses he had been put to in obtaining his freedom, &c. And the Judge should have said to the jury, that these were legitimate things to be considered of by them in assessing the damages. It is obvious, that in this point the court below was misled by the case of *Matilda vs. Crenshaw*. That was a case agreed, and by the agreement it appeared that the annual value of Matilda was \$20, and that she had necessarily expended \$50, in establishing her freedom, for which sum's it was agreed judgment might be given, if the court thought she was entitled to recover. In as much as proof upon these points could have been heard in aggravation of damages, and the jury might have given the whole, the court determined it should be done, upon the case agreed, and judgment was given accordingly. But this is no determination that a jury is bound to make a full allowance. The defendant may introduce circumstances of mitigation, viz: His ignorance of the plaintiff's right to freedom; his uniform kindness to him in sickness and in health, and many other things, which the jury would have the right to take into consideration, and would often prevent their giving, what might otherwise be considered the full measure of justice. The case will be reversed, and remanded for a new trial.

PLANTERS' BANK vs. TAPPAN, *et als.*

An action of debt by an endorsee, will lie against the maker and endorsers of a promissory note, jointly.

The Planters' Bank instituted an action of debt in the circuit court of Williamson county, on the 28th day of November, 1838, against B. S. Tappan, M. P. White W. O. Perkins and C. D. Par-

[Planters' Bank vs. Tappan.]

rish. At the March term, 1839, the plaintiff filed its declaration, in which it was averred that Charles D. Parrish and Moses P. White, on the 25th day of May, 1838, executed a promissory note of that date, binding themselves to pay Benjamin S. Tappan or order, the sum of \$2,250, four months after date, at the Planters' Bank of Tennessee, that said promissory note was delivered to Tappan, who endorsed it and delivered it to Charles D. Parrish and William O. Perkins, that said Parrish & Perkins endorsed the note and delivered it so endorsed to Douglass, Wood & Co., and that Douglass, Wood & Co. endorsed and delivered the note so endorsed to S. Bell, who endorsed and delivered it to the Planters' Bank, the plaintiff in this action; that on the 28th day of September, 1838, the said note was presented at the Planters' Bank for payment, and payment demanded, and was then and there duly protested, of which defendants, on the same day, had due notice.

The defendants, by their attorney Alexander, filed a general demurrer to this declaration, and the plaintiff joined in demurrer.

The cause came on for argument at the July term, 1839, and being argued, the court being of the opinion that the matters alleged in the plaintiff's declaration were insufficient in law to enable the plaintiff to maintain the action, sustained the demurrer, and ordered that defendants go hence, &c.

The plaintiff appealed in error to the supreme court.

Trimble, for plaintiff in error, cited the act of 1837, ch. 5.

Alexander, for defendants in error. An action of debt will not lie against a guarantor or endorser. 1 Chit. Pl. 129; 2 B. & Pul. 78: *Tappan vs. Campbell*, 9 Yer. Rep. 436.

The reason, why debt will not lie against an endorser is, that an endorsement is "an indirect, collateral or contingent liability, created, not by the terms of the instrument, but by operation of law." *Mitchel vs. Miller*, Meigs' Rep. 510: and debt will not lie on such an agreement, as was decided by this court in 9th Yer. 440.

A joint action would not lie against the maker and endorser of a promissory note previous to the act of 1837, ch. 5, as was decided in the case of *Watson vs. Hoge*, 7 Yer. Rep. 344. That statute does not authorise debt to be brought jointly against the maker and endorser of a note; it only gives a joint action, and leaves the par-

[Planters' Bank *vs.* Tappan.]

ticular kind of action to be brought according to the law as it stood before the passage of that statute.

TURLEY, J. delivered the opinion of the court.

This is an action of debt brought by the plaintiff in error *vs.* White & Parrish, as the makers of a promissory note, and Tappan & Perkins as endorsers thereof. The declaration is demurred to; and the demurrer was sustained by the circuit court, upon which a writ of error is prosecuted to this court. It is now contended in support of the judgment of the court below, that an action of debt will not lie against the endorser of a promissory note or bill of exchange, and, therefore, a joint action of debt cannot be maintained against the maker or drawer, and an endorser. The act of 1837, ch. 5; gives a joint action against the maker's of inland bills of exchange, promissory notes, and writings obligatory, and the endorsers thereof.

It is true, this statute does not specify the form of the action, and it becomes necessary for the court to determine, whether debt can be maintained. We think it can; because debt will unquestionably lie against the makers, or drawers of promissory notes, or bills of exchange; and when a statute authorises others to be joined with them without exempting them from the same form of action, or specifying a different one, there can be no reason for forcing the plaintiff to resort to another. We do not mean to determine in this case, whether debt will lie against an endorser sued alone or not; but for argument sake, suppose it would not, and that an action on the case, is the proper remedy. Yet, upon what principle is it, that where endorsers and makers are united in the same suit, the character, in which the endorsers stand, shall dictate the form of action, in preference to that of the makers? None, that we can see. One form of action being proper for the makers, and another for the endorsers, we think, gives the plaintiff a right to select that form, which he supposes will best advance his interest. In this case he has selected the action of debt, and in so doing, we think he has committed no error.

We, therefore, reverse the judgment of the circuit court, and proceeding to render such judgment, as the court below should have pronounced, overrule the demurrer, and give judgment for the plaintiff, for the debt, interest and costs.

MOFFIT vs. THE STATE.

Moffit and Taylor were jointly indicted for an assault and battery, and Moffit, upon his motion, put on his trial first and separately ; held that the wife of Taylor was a competent witness for Moffit.

At the June term, 1838, of the circuit court of Lincoln county, the grand jury indicted William Moffit, James H. Moffit and James Taylor, for an assault and battery upon the body of John Grigsby, by binding him to a tree, scourging him with rods, and thereby inflicting upon him divers wounds and bruises. The defendants pleaded not guilty, and issue was joined thereupon. The cause was continued till the June term. The defendants, William Moffit and James Taylor, were put upon their trial, and a verdict rendered against Moffit for the sum of \$500, and against Taylor for the sum of \$200. This verdict was set aside upon motion of the defendants and a new trial awarded them. At the June term, 1839, the cause was called for trial. William Moffit then presented the following affidavit to the court:

“William Moffit, one of the defendants, makes oath that Mariah Taylor, the wife of James Taylor, is a material witness for him in the trial of this case. He is informed and believes, that he can prove by said witness, that he was at home through the night on which he is charged with the commission of the crime alledged in the indictment, which, if committed at all, was committed at a different place. He farther states, that James Taylor, the husband of the said Mariah Taylor, is jointly indicted with him and another in this case, but that she has intermarried with said Taylor since said crime was committed. He, therefore, prays that himself and the other defendant may be permitted to have their trial separate from said James Taylor, in order that they may have the benefit of the testimony of said Mariah.”

The prayer of this affidavit prevailed and the defendants William Moffit and James H. Moffit were first put upon their trial before a jury of Lincoln, A. J. Marchbanks, presiding. The witness on the part of the State testified that on the — day of February, 1838, at night, in the county of Lincoln, the prosecutor, John Grigsby, was taken out of his bed by five men, disguised, and carried to the forest, bound to a tree and severely scourged with rods, and that two of the five men engaged in this act were the defendants, William and James H. Moffit.

[Moffit vs. The State.]

The defendants then introduced the above mentioned Mariah Taylor, who was the wife of James Taylor, who was jointly indicted with the defendants on trial, but who was not yet tried. The Attorney General, on behalf of the State, objected to her competency as a witness. This objection was sustained and her testimony rejected. The jury returned a verdict of \$500 against William Moffit; and of \$100 against his son James H. Moffit.

The defendants moved the court to set aside this verdict, but their motion was overruled and judgment rendered in conformity with the verdict. The court sentenced William Moffit to three months imprisonment in the common jail of Lincoln county, and James H. Moffit to six weeks imprisonment in the same.

From this judgment the defendants appealed in error to the supreme court.

James Campbell, for defendants in error.

Attorney General, for the State.

REESE, J. delivered the opinion of the court.

The plaintiff in error and one James H. Moffit, and one James Taylor, were jointly indicted for an assault and battery. When the case came on to be tried, the plaintiff in error made an affidavit, that the wife of J. Taylor, the defendant, who had intermarried with him since the finding of the bill, could give testimony material for his defence, and, therefore, moved the court that the Moffit's should be separately tried from the said J. Taylor, the husband of the proposed witness, which was ordered accordingly, and the two Moffits first put upon their trial. The wife of Taylor was then offered as a witness, but was on argument rejected by the court, on the ground that she was the wife of a party, not yet tried, who was jointly indicted with those on trial. And whether the witness was correctly rejected, is the question before the court. It is true that husband and wife are in general incompetent witnesses, either for or against each other, on the ground, partly of policy and partly of identity of interest. It is well settled moreover, that when the husband is on trial with others, jointly indicted with him, the wife is not a competent witness to testify on behalf of those others, although her testimony may not relate to her husband; because, being brought in conflict with witnesses who testify as to the guilt of all, the tendency of her testimony, under such circumstances,

[Moffit vs. The State.]

might confer some benefit on her husband, the jury being probably unable to weigh the testimony properly, according to its just bearing on the different defendants. It has also been determined, that the wife of a defendant, jointly indicted with others for a riot, conspiracy, or other offence, in which the guilty participation of some specified number is made necessary by law, is not competent to testify on behalf of the other defendants, although tried separately from her husband, because the consequence of their acquittal in such case, might be to exonerate her husband from the charge. See 1 Yer. Rep. 431. But the case before us is neither of these. In this case, the husband has no direct interest in the event of the suit, nor can the judgment of conviction or acquittal of Moffit, be evidence on his trial. He might, therefore, himself, on the separate trial, have been a witness, but for the technical rule mentioned in the case of the *State vs. Moody*, 1 Yer. 432, "that defendants jointly sued or indicted, cannot be witnesses for or against each other, until discharged from the suit or prosecution, or at least, until after conviction." But the wife is not a *party*, and, therefore, not within the scope of that technical rule. She is not to be excluded on the ground of identity of interest with the husband, because, as has been said, he has no interest. Her admission as a witness, does not violate the principles of public policy, founded on the relation of husband and wife, because she is not offered as a witness for or against *him*. Upon principle, therefore, the wife may be a witness under the circumstances, and in the case stated in the record. But there is no want of express authority upon the very point. In the case of *The Commonwealth vs. Eastland*, 1 Mass. Rep. 15, it is decided to be a sufficient ground for a separate trial, that the wife of one defendant is a material witness of the other. And in the case of *The State vs. John Anthony, Sr.*, a new trial was granted by the Constitutional court to the defendant, because the wife of the other defendant, jointly indicted for murder, but not on trial with him, had been offered as a witness on his behalf, and rejected by the judge presiding at the trial. 1 McChord's Rep. 286. The judgment, therefore, in the case before us, will be reversed upon the ground stated, and a new trial be granted.

PETTY vs. HANNUM and DRANE.

1. Where a bill was filed against H. & D. former partners, to enjoin the collection of a judgment, obtained on a bill single, (which on a division of the effects had fallen to D.) and D. had answered and denied the equity of the bill, and H. had permitted the bill to be taken *pro confesso* as to him: Held, that such default did not estop D. from denying and disproving the equity of the bill.

2. H. & D. purchased a bill single, given without consideration, without notice of such want of consideration, at a large discount: Held, that they were entitled to recover only so much as they had paid for the said bill single.

John H. Petty, a citizen of the county of Stewart, purchased of William B. Nelson a tract of land, containing three hundred acres, lying in the county of Stewart, State of Tennessee, for which Petty executed his bill single to Nelson, for the sum of \$600, payable on the 1st July 1829. Nelson gave Petty a bond to convey him the land, and put him in possession thereof about the 22nd December, 1828. On the 31st of the same month W. B. Nelson sold the bill single, executed to him by Petty, to Walter H. Drane and Fisher A. Hannum, merchants, and partners in trade, for the sum of \$400 in cash, advanced to him by Drane and Hannum, and endorsed it in the following words: "For value received, I assign the within note to Fisher A. Hannum, guaranteeing the solvency of the drawer. December 31st, 1828."

Neither Nelson, Hannum or Drane, had any knowledge of any equitable defence existing against a recovery on the note, at the time of the sale and purchase thereof. When the bill single fell due, it was presented by Hannum for payment and Petty promised to pay it, and indulgence was granted upon such promise. On a division of the effects of Hannum and Drane, it fell to Drane.

On the 28th August, 1829, the heirs of Wikoff, citizens of Pennsylvania, instituted an action of ejectment against Petty, in the circuit court of the United States, sitting at Nashville, for West Tennessee, for the recovery of the possession of the land so sold by Nelson to Petty. Petty gave Nelson notice of the action so instituted, and requested him to defend the suit, which Nelson did.

At the September term, 1833, of said court, the plaintiffs recovered a judgment against Petty, and he was accordingly ousted of the possession by writ from said court. In the mean time, to wit, on the 31st December, 1830, Hannum and Drane instituted an action of debt in the county court of Stewart county, against Petty upon the bill single, and recovered judgment against him at the

[Petty vs. Hannum.]

August term, 1830, for \$600 debt, and \$39 damages and costs. A *capias ad satisfaciendum* issued on the judgment on the 9th August, 1830; Petty was arrested, and gave bond to keep within the prison limits.

On the 28th March, 1838, Petty filed this bill in the chancery court at Charlotte, against Hannum, Drane and Nelson, alleging that the bill single, executed to Nelson, was without consideration; that this fact was known to Hannum and Drane at the time of their purchase of it; that they purchased it at a large discount, and praying, that Hannum and Drane might be enjoined from collecting the said judgment, and for general relief, &c.

Hannum and Nelson did not answer, and the bill was taken as confessed and set for hearing *ex parte* as to them at the October rules, 1838. Drane answered the bill. He admitted the note was given for the land, and that the land had been recovered from Petty, &c. but denied that he had received it with notice of any failure of consideration; that he took it in the due course of trade and paid therefor the sum of \$400.

To this answer, complainant filed a general replication. The cause came on for final hearing at the March term, 1840, on the bill, answer, exhibit and proof; when the chancellor, McCampbell, decided that the defendant, W. H. Drane, should recover of the complainant the sum of \$400, with interest from the 1st day of July, 1829, and that the defendants, Hannum and Drane, should be perpetually enjoined from collecting the balance of said judgment, &c. and that complainant pay two-thirds of the costs, and that Drane pay one-third thereof, &c. From this decree complainant appealed to the supreme court.

W. A. Cook, for complainant.

I. What is the effect of the *pro confesso* judgment against Hannum, one of the partners? Notice to one partner or joint purchaser is by construction of law, notice to the other. It will not avail to say that the other had no notice in fact; that might well be so, yet the firm or the co-partner who made the contract might have the most full and distinct information. It is not necessary to prove notice upon all the members of a firm. The legal effect, then, of this *pro confesso* is tantamount to a direct confession by Hannum, of notice of the want of consideration, and is equivalent in law, to a confession of notice by Drane.

[Petty vs. Hannum.]

2. The enormity of the discount, at which this note was bought by Hannum and Drane, is conclusive evidence of notice, as this court determined in the case of *Hunt vs. Sanford and Cook*, 6 Yerg. 387.

3. If wrong in these positions, still the defendant would be entitled to the sum of \$400 and interest, there being a negotiation in the course of trade to that amount only. It would be most iniquitous to compel Petty, who had received nothing, to pay Drane more than he had actually paid for the note.

W. K. Turner, for defendant, Drane.

TURLEY, J. delivered the opinion of the court.

The complainant purchased a tract of land from one William B. Nelson, for which he executed his note for the sum of six hundred dollars, due and payable about the 1st day of July, 1829. This note was assigned by Nelson to the defendants, Hannum and Drane, before it became due, at a discount of one-third, or at the rate of sixty-six and two-thirds of a cent in the dollar. Nelson had no title to the land, and complainant has been evicted by the true owners. The defendants obtained judgment on the note, and this bill is filed to enjoin its collection. The bill charges, that Hannum and Drane, at the time they purchased the note, had full knowledge of the failure of the consideration.

The bill is taken for confessed against Hannum, but Drane answers, and denies explicitly, that, at the time of the purchase, either he or his partner, had any knowledge that the consideration of the note had failed, or that they even knew what it purported to have been; he says that after the note fell due, complainant was written to upon the subject of its payment, and that he wrote a letter in reply which is exhibited promising to pay and requesting indulgence, which was granted for several months.

It is very obvious from the letters of complainant to the defendants, that he, himself, was not aware of the failure of consideration of the note, when it fell due, and there can be but little pretence, for supposing that either Drane or Hannum could have acquired the information sooner than himself. Drane denies it most positively, and there is no proof to the contrary. But it is contended, that as Hannum has not answered the bill, but permitted it to be taken as confessed, he is thereby fixed with notice, it being charged in

[Petty vs. Hannum.]

the bill, that notice to one co-partner or joint purchaser, is notice to the other, and that Drane is estopped from denying or proving the want of it on his part. To sustain this position would be to do Drane great injustice. This partnership has long since been dissolved, and in distribution of the effects, the note in dispute fell to his share; he has no power to compel his former partner to answer; where he may be, and whether he has ever had actual notice of the filing of the bill, are wholly unknown to the court; under these circumstances, we say, to hold that a constructive admission of the fact, shall estop his co-defendant, Drane, for urging and proving the truth, would be doing him great injustice.

The question, however, has not been without difficulties; but we have the satisfaction of knowing, that it has been settled consonant with what we believe, to be justice, by the court of errors in the State of New York. In the case of *Clason vs. Morris*, 10 Johnson Rep. 524, it was held, after a laborious investigation, that where a bill in chancery is filed against two defendants, jointly interested, and the bill is taken *pro confesso*, against one for want of appearance, and the other appears and disproves the plaintiff's case, the bill will be dismissed as to both defendants. It is true there was contrariety of opinion among the members of the court, but we think the majority were right, and chose to follow the case. We, therefore, dismiss the complainant's bill, but will not give a decree for the full amount of the note and interest, but only the amount actually paid by the defendants, namely, sixty-six and two-thirds cents in the dollar, with interest thereon from the date of its payment, because we believe that it is only a negotiation of the note in the course of trade for that amount, which we have repeatedly held is the only thing which will protect an endorser of negotiable paper against an equitable defence on the part of the maker, and because, we believe the defendants ought not, in good conscience, to ask to be permitted to make a speculation out of a note situated as this is. Decree accordingly.

VANZANT vs. KAY, THOMAS & Co.

Kay, Thomas & Co. instituted an action of assumpsit against Vanzant as the maker of a promissory note signed "Vanzant & Hyder," and made by Hyder: plaintiffs introduced Hyder as a witness: Held, that he was incompetent to prove that himself and Vanzant were partners at the time of the execution of the note, he being interested in rendering Vanzant responsible for half the amount of the note; but that he was competent (the partnership being proved,) to establish the other parts of plaintiff's case; as the justice of the demand and the like.

Kay, Thomas and Greenfield, partners under the firm and style of Kay, Thomas & Company, instituted an action of assumpsit against Vanzant and others in the circuit court of Franklin county, on the 28th day of April, 1840. The plaintiff entered a *noli prosequi* against all except Vanzant, and declared against him as the maker of a promissory note, which was in the following words: "\$500, Nashville, August 9th, 1839. Four months after date, we promise to pay to the order of Hudspeth & Simmons, payable at the Union Bank of Tennessee, at Nashville, five hundred dollars.

VANZANT & HYDER."

The defendant pleaded *non assumpsit*, and craving oyer of this note, and setting it out, pleaded also *non est factum*. Issue was joined on these pleas. The case was continued till the November term, 1840, when it was submitted to a jury, Judge Marchbanks, presiding. Hyder was offered as a witness: the defendant objected to his competency on the ground, that the witness was interested in fixing his own debt upon the defendant. The judge, however, overruled the objection; his testimony was heard, and is set forth in the opinion of the court. The jury rendered a verdict in favor of the plaintiffs for \$530 damages. A motion for a new trial was made, overruled, and judgment rendered in conformity with the verdict, from which defendant appealed in error.

Taul, for plaintiff in error, cited, 3 Ser. and R. 402.

F. B. Fogg, for defendants in error. One partner is admissible as a witness for plaintiff to prove the partnership, 5 Barnwell & Cresswell, 385; 11 Com. Law Rep: 4 Barn. & Cress. 646; 17 Com. Law Rep. 466: Collyer on partnership, from p. 457 to 460: *Fawcett vs. Walthall*, 3 Carr. & Payne, 305: 12 Com. Law Rep. 138.

[Vanzant vs. Kay, et als.]

GREEN, J. delivered the opinion of the court.

This action was brought against the plaintiff in error, Vanzant and Adam L. Hyder, as the drawers of a promissory note for \$500, payable to Hudspeth & Simmons, dated August 9th, 1839, and due in four months. The note was endorsed by Hudspeth, and also by Patrick & Co., and the suit was commenced against said Isaac Vanzant and Adam L. Hyder, as also against Hudspeth & Simmons, and the Patricks, endorsers. A *noli prosequi* was entered as to all the endorsers, and also as to Hyder, one of the drawers. Vanzant pleaded *non est factum*, and *non assumpsit*, and the case came on for trial, against him alone. The plaintiffs introduced said Adam L. Hyder as a witness, by whom they proved that the note was signed by him, in the name of Vanzant & Hyder. The defendant objected to the competency of the witness, but the court overruled the objection; and the witness on being further examined deposed, that he and Vanzant, in the year 1834, entered into a written agreement to carry on the grocery business, in Salem, in partnership; that they commenced and carried on said business for several years in partnership; that they obtained a grocery license in 1837, which he thinks expired in August, 1838, about which time they disagreed and quit business, and that the note in controversy was given to the plaintiffs the day it bears date, for a balance then ascertained to be due on a settlement of their previous dealings and accounts for groceries purchased of the plaintiffs for the concern of Vanzant & Hyder.

The bill of exceptions states, that the evidence of Hyder was the only testimony offered as to the execution of the note, but that there was other evidence as to the partnership. This other evidence is not set out in the bill of exceptions.

1st. Upon this state of the record, the question is, whether Hyder, the co-partner of the defendant, was a competent witness for the plaintiffs, for any purpose; and if so, for what purpose. In the case of *Blackett vs. Weir*, (5 Barn. & Cress. 385, 11 Com. Law Reports,) one Gibson was called to prove that the defendant had a share in the concern, who admitted on his *voir dire*, that he also was a partner. It was objected for the defendant, that the witness was incompetent. The objection was overruled, and the plaintiff obtained a verdict. Upon a rule to enter a nonsuit, the court held, that the witness was competent, and the rule was discharged.

[Vanzant vs. Kay, et als.]

Bayley, J. said, "The only difficulty arises from his proving a partnership with the defendant ; but his testimony would not prove that in any other action; and if the defendant can hereafter make out, that he was not a partner, I think that he may perhaps at law, and certainly at equity, recover from the witness, all that he is compelled to pay in this transaction."

Holroyd, J. said, "It has been argued, that unless the defendant were fixed with a part, the witness might be made liable to pay the whole debt. But it appears to me, that the defendant would have a right to recover from the witness, in an action at law, for money paid to his use, the whole sum recovered in this action, if he could show, that the witness was originally liable to pay it."

Littledale, J. said, "If he fails, he may sue the witness for the whole, and the latter may then claim contribution from the defendant. To this, it is answered, that in such an action he might not be able to establish that the defendant was a partner. But it must be remembered that the admission of the witness is the only proof of his own liability: it is, therefore, only reasonable to take the whole of his evidence together, and that showed the defendant was jointly liable."

I have quoted thus largely from this case, to show the reasons upon which the decision was made. Bayley, J. thinks the defendant may recover, at least in equity, the whole amount of the witness, if he can make out that he was not a partner; and Holroyd, J. thinks the whole sum might be recovered of the witness, if the defendant could show, that the witness was originally liable to pay it. Thus, according to this case, it is right to make the defendant liable for the whole debt upon the evidence of this witness, and turn him over to an action against the witness, in which, to entitle him to recover the whole, it is admitted by the court, he must prove that he was *not* a partner. And how is he to prove this negative? If there were other testimony by which the fact could be established, the plaintiff would not *need* the evidence of the co-partner. But if there be no such evidence of the fact of partnership, how much less likely is it that there should be evidence, that there was no such partnership? How could any other person *know*, that there was no such partnership between the witness and the defendant? To subject a man to the payment of a sum of money, upon such evidence of partnership, and turn him over to an action against the witness, telling him, that he can recover the

[Vanzant vs. Kay, et als.]

whole, if he can prove that there was *no such* partnership, seems to us to be unreasonable, and unjust. This, Mr. Justice Littledale felt to be a difficulty, but instead of attempting to obviate it, by an argument, he contented himself with saying: "But it must be remembered, that the admission of the witness, was the only proof of his own liability; it is, therefore, only reasonable to take the whole of his evidence together; and that showed the defendant to be liable." This is a perversion of the rule of law. It applies to cases where the statement offered in evidence is against the party making it, or against a partner proved to be such by other evidence, than that of the co-partner. Peake's Evid. 55: 1 Gall. Rep. 638. But even this, as to the co-partner is questionable. 3 John. Rep. 536: 15 John. Rep. 409. But here *Gibson* had admitted his own liability upon his *voir dire*: the statement in relation to the defendant's liability as a co-partner, was made after the objection to the evidence was overruled, and the witness was sworn in chief; so that there is not only a perversion of the rule of law, but a misconception of the fact. The case of *Blackett vs. Weir*, however, was subsequently followed in the case of *Hall vs. Curzer*, (9 Barn. & Cress. 646: 17 Com. Law Rep. 466.) In that case, the witness was proved to be a shareholder by other evidence than his own admission, but the court ruled, that, that fact did not distinguish the case, in principle, from the case of *Blackett vs. Weir*. Without attempting to fortify that case by additional reasoning, the court submit to its authority, and determine that the witness was competent.

But in the case of *Purviance vs. Dryden*, 3 Serg. & Rawle, 402, the reasoning of the court commends itself to our understanding with greatly more force than that we have adverted to in *Blackett vs. Weir*. In the case of *Purviance vs. Dryden*, a summons in debt issued against two partners, but was served on one only, and he alone appeared. At the trial, which proceeded against such partner alone, the other partner was offered by the plaintiff as a witness to prove, that the witness received the money for which the action was brought, on account of a firm consisting of himself and the defendant, and that he paid it over to the defendant, who paid it away principally for debts of his own, contracted before the partnership.

Tilghman, C. J. said, "The witness received the whole money demanded in this suit; of course, he is *prima facie*, answerable

[Vanzant vs. Kay, et als.]

“for the whole, and if the plaintiff fails in this suit, he must pay
 “the whole. The effect of his evidence then is, to take half the
 “burthen off his own shoulders, and throw it on the defendant’s.
 “It is contended that he swears against his interest, because he
 “confesses himself answerable to the plaintiff for the whole debt.
 “True he does so; but tracing the consequences of his testimony
 “to their final result, he gets rid of half the debt, to the whole of
 “which he would otherwise be liable.”

We concur with this reasoning, and think that a co-partner of a defendant, cannot be a witness to prove the partnership. He is interested to create a joint responsibility with himself, and, therefore in the language above quoted, to throw half the burthen on the defendant’s shoulders, the whole of which would otherwise rest on himself. But when the partnership is proved by other evidence, or admitted, the plaintiff *may* call one of the partners to prove other parts of the case. Coll. on Part. 457: 1 Gallison, 630. In such case, the witness is interested to defeat the plaintiff’s claim, because he will be liable to contribution, should there be a judgment against his co-partner. In the case before the court, we are told in the bill of exceptions, that the witness was called to prove the execution of a note, and that there was other evidence as to the partnership. What the other evidence was, we are not informed, and the witness was examined as to the partnership. This should not have been done; and we cannot tell, how much influence it had with the jury, in finding against the defendant on the plea of *non est factum*.

But there is another question in this case: the note upon which the action was brought, was executed by Hyder, in the name of Vanzant & Hyder, the 9th of August, 1839. According to Hyder’s testimony, he and the defendant disagreed, and quit business in August, 1838. This note having been executed after the dissolution of the partnership, (if due notice were given of that fact,) would not be binding on Vanzant. “After the dissolution of a
 “partnership to which the necessary publicity has been given, the
 “partners become so disunited in interest that one cannot by any
 “contract or engagement implicate the credit of the others.” Gow on Partnership 310: Collyer on Partnership 311: 3 Johnson’s Reports, 536: 15 Johnson’s 409, 424: 1 Peters’ Reports, 372. In 1 Peters’ Reports, 371 *et seq.* it is held, that after the dissolution, one partner cannot create a new cause of action,

[Vanzant vs. Kay, et als.]

binding on the co-partner. And in 1 Nott & McChord's Rep. 561, it is held, that he cannot renew a note in bank in the partnership name, although during the co-partnership, the firm had written to the president and directors, requesting to be permitted to renew their note, until the expiration of a certain time, during which time the renewal was given, but subsequent to the dissolution. The next question is, whether Hyder, the partner, is a competent witness for the defendant, to prove that the dissolution of the firm took place before the note was executed. It is laid down in Gow on Part. 239, and also in Collyer on Part. 461, that even though his evidence tend toonerate himself, a co-partner cannot be a witness for the defendant. Both of those authors refer to the case of *Goodacre vs. Breame*, Peake's N. P. C. 174, in which they report Lord Kenyon to have said, "By discharging the defendant he benefits himself, as otherwise he will be liable to pay a share of the costs to be recovered by the plaintiff." But, with deference, it is difficult to conceive how a witness who, by his evidence takes the entire debt upon himself, is interested to give that evidence, because he thereby saves himself from the liability to contribute half of the costs that might be recovered. It would rarely happen, that the costs would exceed the amount of the debt sued for; and if the witness, by his evidence, charge himself with half the debt, and exonerate himself from half the costs, it would seem that his evidence for the defendant would be against his interest. And so it is held in the American courts. In *Grant vs. Shurter*, 1 Wendell Rep. 151, it was held that in an action against the administrators of a deceased partner, the surviving partner is a competent witness to prove the partnership, for by proving a fact which defeats the plaintiff's action, he still remains liable, and cannot be benefited by such failure to recover. In *Robertson vs. Mills*, (2 Harris & Gill, 98, as reported in a note to page 462, of Collyer on Partnership,) the action was against two partners on a note signed with the name of the firm; one only was arrested. It was held that the other partner was a competent witness to prove that the note was given by himself for his separate debt to the plaintiff, and that when he signed the note, he informed the plaintiff, that he was not authorised to sign the partnership name.

This case is expressly in point; and as the contrary doctrine is supported by a single *nisi prius* case only, with the reasoning of which, we cannot concur, we feel at liberty to disregard its au-

[Planters' Bank vs. White.]

thority and follow the cases above cited. We are, therefore, of opinion :

1. That a co-partner of the defendant is not a competent witness for the plaintiff to prove the partnership.

2. That he is competent, the partnership being admitted, or clearly established by other evidence to prove the justice of the plaintiff's demand.

3. That in general, he is not a competent witness for the defendant; but,

4. That he is competent to prove that himself, and not the defendant is liable.

The consequence of these positions, in the case now before us, is, that the testimony of Hyder, as to the existence of the partnership, whereby to charge Vanzant, was inadmissible; but that his evidence, proving the execution of the note by himself, and the dissolution of the partnership before that time, was properly received.

Let the judgment be reversed, and the cause remanded for another trial.

PLANTERS' BANK vs. WHITE.

1. Notice of the non-payment of a note, the endorser being dead, should be transmitted to his personal representative.

2. Where the notice was duly transmitted to the usual place of residence of the endorser, under the belief that he was alive, when in fact he was dead: Held, that such notice was sufficient.

On the 11th day of March, 1839, Moses P. White executed his note to A. M. White, for the sum of \$2,100 28, payable four months after date, at the Planters' Bank. A. M. White endorsed and delivered this note to Douglass, Wood & Co.; and Douglass, Wood & Co. endorsed and delivered it to the Planters' Bank. Before it fell due, to wit, on the 22nd day of May, 1839, A. M. White died, and on the 24th, notice of his death was published in the Franklin Review, a newspaper published weekly in the town of Franklin, Williamson county, of which, thirty numbers were taken in the town of Nashville, and a copy of the paper was taken also by Watson and Gibson, Watson being the President of the Planters' Bank. On the first Monday in June, 1839, Susan

[Planters' Bank vs. White.]

White took out letters of administration upon the estate of her deceased husband, A. M. White. At the maturity of the bill single it was protested for non-payment, and Alpha Kingsley, notary public, deposited a notice of the demand and protest, on the 13th day of July, 1839, (the 14th, the regular day of notice, being Sunday,) in the post office at Nashville, directed to A. M. White, Franklin. The administrator resided at the mansion house of the deceased in the town of Franklin. The Notary did not know of the death of White, and it does not appear by any direct proof that the Bank knew of his death. The intercourse between Nashville and Franklin was constant and his death might have been ascertained at any time.

The Bank instituted an action against M. P. White and Susan White, administratrix, in the circuit court of Williamson county, on the 20th day of February, 1840. The defendant, S. White, pleaded "non assumpsit" and "no notice:" upon these pleas issues were joined and the cause was submitted to a jury upon the above facts, at the November term, 1840. Judgment passed against M. P. White by default.

The presiding judge, Maney, charged the jury that the undertaking of an endorser was conditional, not absolute; that to hold the endorser liable it was incumbent on the holder to show that demand of payment was made at the time the note fell due, at the place designated in the note for payment, and that notice of non-payment was given within reasonable time, and that proof of the notice being sent to the post office nearest the residence of the endorser was sufficient. The court further charged the jury that if the note was endorsed by A. M. White at the time it bears date, notice should have been given on the 14th July, but if the 14th of July was on Sunday, then notice should have been transmitted on the 13th; that the law did not impose on the holder the necessity of enquiring whether the endorser was dead or alive; but if White was dead and letters of administration were taken out upon his estate before the obligation became due, and these facts were known to the holder, then it was incumbent on such holder to give notice to his administratrix. If, however, the administratrix received notice, although directed to the intestate, it would be sufficient.

The jury rendered a verdict for plaintiff for \$2,274 87. A motion was made to set this verdict aside, but it was overruled and

[Planters' Bank vs. White.]

judgment rendered for the plaintiff. The defendant appealed in error to this court.

Alexander, for plaintiff in error.

A. Ewing, for defendant in error.

GREEN, J. delivered the opinion of the court.

The intestate of the plaintiff in error, Abram M. White, was the first endorser, on a note for \$2,100, drawn by Moses P. White and payable at the Planters' Bank the 11-14th of July, 1839, and dated the 11th of March preceding. A. M. White, died the 22nd of May, 1839, and at the June term following, of the Williamson county court, the plaintiff in error was qualified as his administratrix.

The note was protested for non-payment, and notice thereof, addressed to A. M. White, at Franklin, his late residence, was deposited in the Post Office at Nashville in due time. The notary public, who gave the notice, knew nothing of the death of White at the time the note fell due, nor is there any evidence, that any of the directors of the Bank knew this fact.

The only question in the case is, whether the notice addressed to the endorser, after his death, is sufficient to fix his representative. There is no doubt, but that notice should be given the executor or administrator of a party who is dead. Chitty on Bills, 629. But if there be no executor or administrator, notice sent to the residence of the deceased party's family is sufficient, (Chitty, 529, note K.) and if there be an executor or administrator, but their existence be not known to the holder, notice addressed to the endorser, at the residence of his family is sufficient. 17 John. Rep. 25-27.

The executor or administrator, having possession of the papers of the deceased endorser, and interested to know the state of his affairs, would take letters addressed to him, out of the Post Office, and thus, at least, for some months after his death, be as likely to obtain information communicated under his address, as though it had been addressed to the administrator himself. And when we consider the impossibility, that knowledge of the qualification of an administrator, should exist at a great distance from the residence of the parties for several months afterwards, it would be absurd to require that notice should be addressed to him, whether this knowledge existed or not. To do so, would be to cripple the circulation

[Johnson vs. Morgan, et als.]

of commercial paper, without conferring any benefit upon the estate of the endorser.

In this case the jury have found, under a proper charge of the court, that the holder had no knowledge of the qualification of the administrator. Let the judgment be affirmed.

JOHNSON and HEAM vs. MORGAN, ALLISON & Co.

Johnson purchased slaves of Richmond, paid the purchase money, took a bill of sale of the slaves and received the possession of them: Held, that said slaves were subject to the execution claims of creditors until said bill of sale was registered: no title passed as against such creditors but by deed registered before the lien of the execution attached.

Johnson and Heam filed this bill in the chancery court at Lebanon on the 30th day of April, 1840, against Morgan, Allison & Co. to restrain by injunction the sale of certain slaves. The bill alleges that complainant, Johnson, purchased on the 12th day of February, 1839, four slaves, to wit, Boason, Rosetta and her two children, of one Richmond; that Johnson paid the purchase money, took a bill of sale and possession was delivered to him in accordance therewith, and that shortly after the purchase of said slaves he gave Rosetta and her two children to complainant Heam, who had intermarried with his daughter.

The bill alleges further, that on the 13th day of May, 1839, the aforesaid Richmond executed a note to Morgan, Allison & Co.; that suit was instituted thereupon against said Richmond, in the circuit court of Wilson county, and that at the March term, 1840, judgment was recovered on the same for the sum of \$629 89; that executions issued therefor, which came to the hands of the sheriff of Wilson county and was by him levied on the slaves, Rosetta and her two children, in the possession of complainant, Heam.

The bill further alledges, that said sale was without fraud and *bona fide*, and that all the facts and circumstances connected therewith, were well known to defendants Morgan, Allison & Co., and that said defendants, were not seeking to subject the said slaves to the payment of the debts of Richmond, on the ground that there was any fraud in the sale, but on the ground that his bill of sale was not registered at the time of the recovery of the judgment afore-

[Baldwin vs. Marshall.]

said. An injunction was applied for and ordered by judge Caruthers. The defendants filed a demurrer to this bill and complainants joined in demurrer. This demurrer was argued before the chancellor, Ridley, at the July term, 1840, and the bill was dismissed at the cost of complainants; from this decree complainants appealed.

R. M. Burton, cited and commented upon the act of 1784, ch. 10, sec. 7; 1789, ch. 59, sec. 2; 1831, ch. 9, sec. 1-6-12, and contended that under the circumstances of the case, registration was not necessary, and that the title had passed at the time of the levy, and that consequently the slaves were not subject to the execution of Morgan, Allison & Co.

Caruthers, for defendant, regarded this question as settled by the previous adjudications of the State. *Douglas vs. Morford*, 8 Yerger, 373. *Payne vs. Lassiter*, 10th Yer. 507. *Banks vs. Thomas, Meigs*, 28.

Per Curiam. Johnson and Heam acquired no title to these slaves against the defendants until the bill of sale of Johnson was registered. This was not done until the lien of defendants' execution attached. Let the decree of the chancellor be affirmed and the bill dismissed.

BALDWIN vs. MARSHALL.

1. A register who has made an incorrect registration of a deed, may correct such incorrect registration, and such register is a competent witness to prove the correction and the date thereof in any suit between third persons in regard to such deed.

2. Registration being intended to give notice to creditors and subsequent purchasers, such corrected registration would operate against such creditors and purchasers only from the date of the correction.

On the 28th January, 1839, Lewis C. Allen sold and conveyed by deed to H. Baldwin, certain slaves, horses, and two horse mules, in trust to secure said Baldwin and others therein specified, in the payment of certain debts, and to indemnify them against liabilities incurred for him. The mules were described in the deed as "horse mules." On the 28th day of February, 1839, it was proven by

[Baldwin vs. Marshall.]

the two subscribing witnesses, before the clerk of the county court, of Williamson county, the county of the residence of the parties, and on the same day it was registered in the same county. The register, however, misunderstanding the terms of the deed, described the mules on his books as "mare mules." James Marshall applied to the register to examine the deed on the 3d of September, 1839, and finding that two "horse mules" were not, as he supposed, included in the deed, directed Harrison, the sheriff of Williamson county, who held an execution against said Allen in favor of Marshall, to levy such execution upon the mules. This was done. On the 7th, Baldwin ascertained the mistake in the registration of the deed, applied to the register, Figures, and had the mistake corrected. The mules were sold by the sheriff to satisfy Marshall's execution.

Baldwin thereupon instituted an action of trespass against Marshall, in the circuit court of Williamson, on the 14th October, 1839. The defendant pleaded not guilty, and issue was taken thereupon. At the March term, 1840, it was submitted, on the above facts in proof, to a jury. The register, Figures, was introduced to prove the defective registration and the correction thereof. His testimony was objected to by the defendant, but the objection was overruled, and his statement admitted to go to the jury. Maney, presiding judge, charged the jury, that the register had a right to correct a defective registration, but that the parts of the deed so corrected operated as a valid and registered deed, only from the date of such correction, as against creditors and subsequent purchasers. The jury rendered a verdict for the defendant. A motion for a new trial being overruled and judgment rendered for defendant, plaintiff appealed in error.

Marshall, for plaintiff in error.

Alexander, for defendant in error.

GREEN, J. delivered the opinion of the court.

This is an action of trespass for taking two horse mules, the property of the plaintiff. It appeared in evidence, that Lewis C. Allen, on the 28th day of January, 1839, executed a deed of trust to the plaintiff, conveying several mules and horses, and among them, the two mules described in the declaration. This deed was registered the 28th February, 1839, and the register's certificate of

[Baldwin vs. Marshall.]

that fact, then endorsed upon the deed. Afterwards, the register discovered that he had not correctly copied the deed, and that the mules in controversy, were described in the register's book, as "*mare* mules," whereas the deed described them as "*horse* mules." Upon discovering this mistake, the register, on the 7th of September, 1839, corrected his copy so as to make it read, "*horse* mules," instead of "*mare* mules." These facts were proven by the register, who was introduced as a witness in the cause, for that purpose.

The court charged the jury in substance; that a deed registered only could operate as notice of such conveyance of the property described in the registration; that after the supposed registration of a deed, if the register should ascertain he had mistaken some words, he might lawfully correct the registration, by inserting the words of the deed in place of those that had been written by mistake, but that, as by the act of Assembly, as against creditors and subsequent purchasers, deeds take effect only from the date of their registration, the corrected words, would only have effect from the time of their insertion.

There was a verdict and judgment for the defendant, and the plaintiff appealed in error to this court. The law was correctly stated by the court below. The registration, is the only notice the law contemplates, that purchasers and creditors can have of the contents of a deed.

The whole contents of the deed are to be spread upon the register's book, and other persons have a right to presume, that it has been correctly copied. To require that purchasers should examine the *original* deed, would be destroying the utility, and perverting the object of registration. This would be exceedingly inconvenient, and sometimes impossible, and in the language of the Chancellor in *Frost vs. Beckman*, (1 John. Chan. Rep. 299,) "The registry might prove only a snare to the purchaser."

The registry is good, therefore, and notice to others, only so far as it correctly describes the property, and if corrected, cannot take effect as to the correction, except from the date thereof. 1 John. Chan. Rep. 299. The register was a competent witness to prove the correction of the registry, and the date when such correction was made. *Miller's lessee vs. Estill*, Meigs' Rep. 479. Let the judgment be affirmed.

WALKER vs. WHEATLY.

1. A parol rescission of a written contract may be set up in equity in bar of an application for a specific performance; such parol rescission must however be clearly and satisfactorily made out in proof, and the terms of it fully complied with and executed.

2. Where a parol agreement to rescind a bond to convey land, had been made, and the bond for title and the note executed for the payment of the balance of the purchase money had been deposited in the hands of a third person to be delivered over to the parties entitled thereto, when the money which had been paid by the vendee should be returned: held that this agreement to rescind continued an executory agreement till the money advanced was repaid, and that such parol agreement was not so far executed as to defeat an application for a specific performance.

Thomas Walker filed his bill in the chancery court, at Columbia, against Samuel Wheatly, praying the specific execution of a contract. The bill charges, that Wheatly sold to him one hundred and fifty acres of land, lying on Flat creek, in Maury county, on the 1st day of March, 1837, and that said Wheatly then executed to him a bond in the following words:

“Know all men by these presents, that I, Samuel Wheatly, am held and firmly bound unto Thomas Walker, in the sum of \$575, for the payment of which, I bind myself, my heirs, executors and administrators, firmly by these presents. Given under our hands and seals, this 1st day of March, 1837.

The condition of this obligation is such, that, whereas, the said Wheatly has sold to the said Thomas Walker, a certain tract of land, lying on Flat creek, and bounded as follows, &c., containing 150 acres, for the sum of \$285, to be paid as follows, two hundred dollars in cash, and seventy-five dollars, to be paid next Christmas. Now, if the said Samuel Wheatly shall make, execute and deliver to the said Thomas Walker, a good and valid title in fee simple for said tract of land, with covenants of general warranty of title, on or before the 20th of April next, then this obligation to be void, otherwise to remain in full force and virtue.”

The bill further charges, that the \$210 were paid at the time, and that complainant executed and delivered to Wheatly his note for the balance of the purchase money, to wit, the sum of \$75. The bill further charges, that after the 20th of April, 1837, he procured a deed from said Wheatly to himself for the land to be written in accordance with the bond for title, and tendered the balance

[Walker vs. Wheatly.]

due said Wheatly and the deed, with a request, that he receive the money and sign the deed, but that Wheatly refused to execute the contract. The bill prays, that the contract may be specifically executed in accordance with the bond, &c.

On the 20th May, 1838, the defendant Wheatly filed his answer. He admits the contract was made as set forth in the bill of complainant, but alledges that in some short time after the period arrived at which the balance of the purchase money was to be paid and the deed made, complainant "took it into his head," that the title of respondent to the land was defective, and was unwilling to take a deed from respondent, but proposed to rescind the contract. This, respondent finally agreed to do: that it was then agreed that respondent should deliver up the \$75 note, which he held, to a third person, and that he should execute his note to complainant for the \$210 which he had paid respondent, with interest from the 1st of March, 1838, and complainant should deposit the title bond with such person; that complainant did deposit the title bond; and he delivered up the \$75 note in accordance with this contract of rescision; that complainant hearing that respondent had a bond on A. O. P. Nicholson for \$200, payable in cash notes, and being desirous of having Nicholson as his paymaster, proposed that Nicholson's note should be deposited in the hands of the same third person, to which respondent assented, and deposited the Nicholson bond with this mutual depository, together with ten dollars to make out the amount respondent had received; that respondent then considered the contract at an end, and that he accordingly rented out the premises; that after the lapse of a considerable time, complainant applied to Nicholson for payment, and that Nicholson offered to pay in cash notes according to the terms of his bond, and that complainant refused to take them, withdrew the title bond and demanded a deed, which respondent then declined doing, considering the contract as rescinded.

At the October rules, 1838, the complainant filed a general replication to the answer of defendant. There was but three depositions taken in the cause. Holcomb testified that he applied to complainant in 1837 to rent the tract of land in controversy, and that he informed him that Wheatly and himself had rescinded their contract, and that if he wanted to rent the land he must go to Wheatly. He did go to Wheatly and rented the land from him.

Dale testified, that some time in the year 1837, complainant and

[Walker vs. Wheatly.]

defendant came to him and informed him that they were about rescinding a contract for land formerly sold by defendant to complainant, and requested him to draw two notes, one for one hundred dollars, and the other for one hundred and ten dollars, payable in March, that the notes were drawn but not signed, and were left in his hands until complainant should deposit with him the title bond of defendant, and the defendant the note of complainant; that the title bond and note were deposited accordingly, but defendant declined signing the notes, saying he had a claim of two hundred dollars on A. O. P. Nicholson, which he would give in lieu of his own notes, and at the same time handed him ten dollars, directing that it should be paid over to complainant when Nicholson should discharge the bond; that the note, money and title bond remained in his possession till after March, 1838, and that defendant frequently inquired if Nicholson had paid the two hundred dollars.

Nicholson testified, that during the pending of the negotiation in regard to the rescision of the contract, complainant and defendant applied to him to know if he was willing to become paymaster to Walker on the bond held by Wheatly, to which Nicholson replied that he was willing to pay to either according to the terms of his obligation; that at a subsequent period Walker applied to him for the payment of the bond, and demanded money, that witness declared himself in readiness to discharge the bond according to its tenor, in cash notes, but refused to pay money therefor; that the bond had not been discharged, and he did not know which of the parties held it.

The cause came on for hearing at the September term, 1839, on the bill, answer, replication and proof. Bramlett, the presiding chancellor, dismissed the bill. Complainant appealed.

Frierson, for complainant. Admitting that a parol discharge of a written contract, may be set up in bar of a bill filed for a specific performance, still it is contended for the complainant that this is not such a case as comes within the meaning of the decisions upon this subject. The waiver spoken of in the cases is an entire abandonment and dissolution of the contract, restoring the parties to their former condition. *Price vs. Walker*, 17 Ves. 354. The abandonment or rescision of the contract in this case has not been executed. The money paid by Walker has never been repaid to him. This alledged rescision was an executory agreement to re-

[Walker vs. Wheatly.]

scind, the terms of which the defendant did not comply with. Sugden (V. & P. 180,) uses the following language, "Whether an
 " absolute parol discharge of a written agreement, not followed by
 " any other agreement upon which the parties have acted, can be
 " set up as a defence in equity, seems questionable." The proof under such circumstances should be very satisfactory, both as to the fact of the discharge, and the subsequent execution of the terms of such discharge.

J. H. Dew, for the defendant. Is parol evidence admissible in a suit in chancery for a specific performance to show a rescision or waiver of a written agreement sought to be specifically executed? The authorities are very numerous in England and America on this point. The rule of law is well settled, that when a court of equity is called upon to exercise its peculiar jurisdiction, by decreeing a specific performance, the party to be charged is to be let in to show by parol, that under the circumstances of the case the complainant is not entitled in equity and good conscience to have the written agreement specifically performed. Sugden's law of vendors, 101 and references, note *h*: 7 Ves. Jun. 219: *McMeen vs. Owen*, 1 Yates, 135: S. C. 2 Dall. 171-3: *Field, et al, vs. Biddle*, 1 Yates 132: *Walker vs. Walker*, 2 Atk. 98: 6 Ves. Jun. 337, n. Joynes Statham, 3 Atk. 388: *Wollam vs. Hearn*, 7 Ves. Jun. 211: *Marquis of Townsend vs. Stangroom*, 6 Ves. Jun. 328: *Clark vs. Grant*, 14 Ves. Jun. 519: *Clowes vs. Higginson*, 15 Ves. Jun. 523: *Winch. vs. Winchester*, 1 Ves. & B. 375: *Ramsbottom vs. Gorden*, 1 Ves. & B. 165: *Hurst lessee vs. Kirkbridge*, 1 Bin. 616: *Harvey vs. Harvey*, 2 Chan. Ca. 180: *Price vs. Dyer*, 17 Ves. 356: *Clowes vs. Higginson*, 1 Ves. & B. 524: *Washburn vs. Merrills*, 1 Day, 139: *Buckhouse vs. Crosby*, 2 Eq. Ca. Ab. 32, 44: *Hasbrouck vs. Tappan*, 15 John. Rep. 200; *Gillespie vs. Moon*, 2 John. Chan. Rep. 585, 595: *Benedict vs. Lynch*, 1 John Chan. Rep. 370 to 382: *Kesselbrack vs. Livingston*, 4 John. Chan. Rep. 144, 149: 1 Story's Eq, 173 to 185, and the numerous references in notes: 1 Peters' Dig. 458, 462, cases there referred to: 2 Analytical Dig. R. of New York, 483 to 485: *Stephens et al vs. Cooper et al.* 1 John. Chan. Rep. 425 to 431: *The Hiram*, 1 Wheat. 444: *Hunt vs. Rousmanier*, 8 Wheat. Rep. 211: *Hagan vs. Delaware Insurance Co.* 1 Wheat. Rep. 422: *Vandevort vs. Smith*, 2 Cain's Rep. 155: *Davis vs. Simmons*, 1 Cox's Rep. 402-4: *Hepburn vs. Dunlap*, 1

[Walker vs. Wheatly.]

Wheat. Rep. 197, Jeremy's Eq. Jur. 432: *Harris vs. Knickerbocker*, Cowen's Rep. 638: 1 Maddock's Chan. 406-7, and references to adjudged cases. ¶ I particularly refer the court to the case of *Gillespie vs. Moon*, 2 John. Chan. Rep. 585, Chancellor Kent's remarks upon Lord Resdale's *dictum* in *Clinaw vs. Cooke*, 1 Scho. & Lef. 39: also the case of *McMeen vs. Owen*, 1 Yates, 135: *Field, et al. vs. Biddle*, 1 Yates, 132: S. C. 2 Dal. 171-3: *Clowes vs. Higginson*, 1 Ves. & Beams, 524.

The result of the numerous decisions in England and America upon the question, whether a court of chancery, in the exercise of a sound and reasonable discretion, will refuse to decree a specific execution of a written contract, may be reduced to this: the complainant must come into court with clean hands and prepared to show that he has done or is ready and desirous to do all things fairly and honestly on his part connected with the transaction, and his testimony must establish satisfactorily the allegations in his bill. And the defendant may by parol proof, disprove the allegations and charges in the complainant's bill—first, by his answer; and, secondly, by disinterested and creditable persons, that the first contract has been rescinded or waived by a subsequent parol agreement or waiver; such parol rescision or waiver by well settled rules of chancery practice, renders the first contract null and void, and a court of chancery will unhesitatingly refuse to decree a specific performance. The defendant may show any facts and circumstances independent of the written contract, such as fraud, concealment, misrepresentation, mistake, undue advantage, inadequacy of consideration, defect of title, rescision or parol waiver, and every other kind of unfairness, or any fact or circumstances making the enforcement of the written agreement inequitable, unconscientious, unreasonable and unjust. The proof here shows beyond all doubt, that the contract was rescinded, that Walker so regarded it, that he refused to rent the land to Holcomb, and referred him to Wheatly, and that Wheatly rented the land to him, and that Wheatly had done every thing that he was bound to do by the strictest terms of the contract towards a compliance therewith.

The decree of the court of chancery was therefore correct, and should be affirmed.

TURLEY, J. delivered the opinion of the court.

On the 1st day of March, 1837, the defendant sold to complain-

[Walker vs. Wheatly.]

ant one hundred and fifty acres of land for two hundred and eighty-five dollars, and executed his bond, binding himself to convey to the complainant a good and valid title in fee-simple to the same by the 20th day of April, 1837. Complainant has paid \$210 of the purchase money, leaving a balance of \$75 due, for which he gave defendant his note. Defendant having failed to convey to the complainant at the time specified, this bill is filed for a specific execution of contract. This, defendant resists upon the ground as alleged in his answer, that after the making of the contract it was rescinded by parol, by the mutual agreement of the parties. The question of law, that is argued mainly in the case, is, whether a parol rescision of a contract can be set up in equity to defeat an application for a specific performance. That it can be done when the parol rescision is clearly and satisfactorily established, is certain. See Sugden on vendors, 101, and references. But the principal question in this case, and the one on which it turns is, whether there is any satisfactory proof that the contract has been rescinded: and we are most clearly of the opinion, that there is none. The defendant's answer itself, makes out nothing more, when properly examined, than an executory contract to rescind, the condition of which on his part he never performed. He says in substance, that after the contract to sell the land was made, and the \$210 were paid, the complainant became doubtful of his title to the premises, and they mutually agreed that the contract should be rescinded upon his paying him back the money he had received, and delivering up the note which he held upon complainant for the balance of the purchase money: that he was to execute to complainant his note for the payment received with interest, and was to deliver up to a third person, the note for the balance of \$75: that he did deliver up to the third person the note specified, and was about to execute his own notes as agreed upon, when complainant learning that he held a claim upon A. O. P. Nicholson for a sum nearly equal to the amount to be paid, was anxious to have said Nicholson for his paymaster, to which he agreed: that complainant called upon Nicholson, who promised to pay him, with which complainant expressed himself satisfied, and told him that he need put himself to no further trouble about it, whereupon he deposited \$10, the balance to make Nicholson's note equal to the demand of the complainant's, together with the seventy-five dollar note in the hands of the third person referred to, and the complainant at the

[Walker vs. Wheatly.]

same time deposited in the hands of the same person the bond for the title, and he considered the contract rescinded. Whether this contract of rescission was executed or not, depends upon the question of who was to be responsible for Nicholson's failure to pay his note, the complainant or defendant; if the complainant took it in absolute discharge of so much of his debt, agreeing to risk the payment, then the contract was executed, there remaining no more to be done; but if he took it only as a means through which he might get the money due by the defendant, and the defendant was to be responsible for Nicholson's payment, then the contract was not executed until the money was paid, which having never been done, the contract would remain executory: and that the defendant was to remain responsible, his answer clearly shows. If the complainant agreed to take Nicholson's note in absolute discharge of so much of his demand, why the necessity of depositing the \$10, the \$75 note and the bond for title in the hands of the third person? if there were nothing more to be done, if the defendant was not to remain responsible, why not have paid the ten dollars to the plaintiff, delivered up to him his note, and taken up his own bond? The transaction between them would have been at an end; but if we were left doubtful from the answer, that this is the true state of the case, all doubt will be removed by the examination of the testimony of E. W. Dale, the third person spoken of in the answer, with whom the deposit was made. He says, that some time in the year 1837, complainant and defendant came to him and informed him, that they were about rescinding a contract for land previously sold by the defendant to the complainant, and requested him to draw two notes, one for one hundred dollars, the other for one hundred and ten dollars, payable in March; that the notes were drawn, but not signed, and were left in his hands until the complainant should deposit with him the title bond of defendant, and the defendant the note of the complainant; that the title bond and note were deposited accordingly, but the defendant declined signing the notes, stating that he had a claim of two hundred dollars on A. O. P. Nicholson, which he would give in lieu of the notes to complainant, and at the same time handed him ten dollars in money, which he directed him to pay over to complainant when Mr. Nicholson should have paid the two hundred dollars; that the money, title bond and note remained in his possession after March, 1838, during which

[Bream, et al. vs. Dickerson, et al.]

time defendant frequently called and enquired if Nicholson had settled the two hundred dollars with complainant.

There can be no doubt then left, that defendant was liable for Nicholson's defalcation; the money has never been paid him; the defendant has always refused to pay it to him himself. Then here is a contract to rescind upon the repayment of the purchase money, or the execution of notes by the defendant therefor, neither of which has ever been done; the contract then is not executed, but executory, and as such no bar to the complainant's right to relief.

The decree of the chancellor will be reversed, and a specific execution of the contract decreed here.

BREAM & Co. vs. DICKERSON & SHREWSBERRY.

1. A covenant by the lessor to pay the lessee the cash valuation of such improvements as the lessee might leave standing upon the premises leased at the termination of his lease, is not a covenant running with the land, so as to change the assignees of the reversion under the provisions of the statute of 32d, Henry 8th, ch. 34. The covenant is personal and binds the lessor only. The assignee of the reversion is not bound in such case unless by express words.

2. The reservation of power by the lessor to pay the value of improvements in one, two and three years, or at his election, to pay the same out of the rents of said improvements, if they would rent for an amount sufficient to pay the said value, does not create an equitable charge upon the estate so as to authorize the lessees or their assignees to hold possession till the value aforesaid should be discharged.

3. Where there is such an alternative covenant and the lessor assigned the reversion, the lessor and those representing him loses by such assignment the power of electing, to pay the value of improvements out of the rents, and the lessor is left liable on his covenant to pay in one, two and three years.

All the material facts in this case are concisely and clearly stated in the opinion of the court.

Cook, for complainants.

Washington, for defendants.

TURLEY, J. delivered the opinion of the court.

On the 4th day of September, 1828, Whitmel H. Boyd, Samuel B. Marshall and John C. McLemore, entered into an agreement

[Bream, et al. vs. Dickerson, et al.]

under their hands and seals, by which Boyd leased to Marshall and McLemore, for a term of ten years, a lot of ground, in Nashville, with a front of 60 feet on Market and Water streets. As a consideration for the lease, Marshall and McLemore covenanted to pay Boyd and his heirs, the sum of one hundred and fifty dollars per year, and also the further sum of five hundred dollars at the expiration of the lease. Boyd covenanted for himself and his heirs, to pay and satisfy Marshall and McLemore, their heirs and assigns, at the expiration of the lease, the full and fair cash valuation of such improvements as might be standing on the premises at the expiration of the lease, provided it did not exceed the sum of fifteen hundred dollars: this sum, whatever it might be, he reserved to himself the right to pay in one, two and three years from the expiration of the lease, or to pay the same out of the rents of said improvements, if they would rent for an amount sufficient to pay it. Marshall and McLemore took possession of the premises under this lease, and made thereon improvements, which are still standing, and worth, as is averred by the complainants, more than fifteen hundred dollars. This lease by regular assignment became the property of James Bream & Co. Some short time after the date of the lease Whitmel H. Boyd died, and in order to effect a division of his estate among his heirs, a bill in chancery was filed, and the whole estate was sold under a decree of court. Under this proceeding James P. Hollman and wife became the legal owners of the reversion in fee to the premises leased, as has been stated: they sold and conveyed to Joseph W. Horton, and he to the defendants Dickinson & Shewsberry. At the expiration of the lease, the complainants insisted on the right to have satisfaction for the value of the improvements according to the contract of lease from the defendants, as assignees of the reversion, or to be permitted to take the same out of the rents and profits, both which was refused by the defendants. An action of ejectment was brought by the defendants to gain possession of the premises, and this bill is filed by the complainants to enjoin the action, until these defendants will either pay the value of the improvements, or permit them to be received out of the rents and profits, and for general relief.

The right of the complainants to relief in this case, depends upon two legal propositions.

1st. Is the covenant of W. H. Boyd for himself and heirs, to pay for the improvements which the lessees, Marshall and McLemore,

[Bream, et al. vs. Dickerson, et al.]

might leave standing on the premises, such a covenant as runs with the land, and will under the provisions of the statute of 32d, Henry 8th, ch. 34, charge the defendants as assignees of the reversion: whether a particular express covenant sufficiently touches and concerns the thing demised, as to be capable of running with the land, is not unfrequently a question of difficulty, but such as we do not feel it to be in the case now under consideration. There is no covenant on the part of the lessees to improve; they may do so, or not, at their option. The covenant is on the part of the lessor to pay for improvements if they should be made and left standing at the expiration of the lease. A covenant to run with the land must *touch* and *concern* it, and it is difficult to conceive how a covenant to pay a pecuniary consideration for a house, if the tenant shall think proper to erect it, can be said to touch and concern the estate. But, even supposing that the tenants in this case had covenanted to make improvements, we are of opinion it would have been a covenant, not running with the land and not binding upon the assignee of the assignor of the reversion. We consider this very point settled directly and conclusively by *Spencer's case*, 5th Coke's Rep. 16. That case was this: Spencer and wife brought an action of covenant against Clark, assignee of J., assignee of S., and the case was this: Spencer and wife by deed indented, demised a house on certain land to S. for a term of 21 years, by which indenture S. covenanted for himself, his executors and administrators, that he, his executors, administrators or assigns, would build a brick wall upon a part of the land demised; S. assigned to J. and J. to the defendant, and for not making the brick wall, the plaintiffs brought the action of covenant against the defendant as assignee. The first point adjudged is, when "the covenant extends to a thing *in esse*, parcel of the demise, the thing to be done by force of the covenant is *quodam modo* annexed and appurtenant to the thing demised, and shall go with the land, and shall bind the assignee, although he be not bound by express words; but when the covenant extends to a thing which is not in being at the time of the demise it cannot be appurtenant or annexed to the thing which hath no being; as if the lessee covenants to repair the houses demised to him during the term, that is parcel of the contract, and extends to the support of the thing demised, and therefore, is *quodam modo* annexed and appurtenant to the houses, and shall bind the assignee, although he be not expressly bound by the covenant;" but

[Bream, et al. vs. Dickerson, et al.]

in the case at bar, the covenants concern a thing which was not *in esse* at the time of the demise made, but to be newly built thereafter, and therefore shall bind the covenantor, his executors and administrators, and not the assignee, for the law will not annex the covenant to a thing which hath no being.

The 2d point resolved in this case is, if the lessee had covenanted for himself and his assigns, that they would make a new wall upon some part of the thing demised, that for as much as it is to be done upon the land demised, that it should bind the assignee; for although the covenant doth extend to a thing to be newly made, yet it is to be made upon the thing demised, and the assignee is to take the benefit of it, and therefore shall bind the assignee by express words.

The 1st point in this case determines, that a covenant to build a new wall upon the demised premises does not run with the land. And the 2d, that the assignee is not responsible in the covenant, unless he be bound in it by express words. There can be no difference in the legal construction of a contract to erect a wall, and one to build a house, and, therefore, if McLemore and Marshall had covenanted to build upon the leased premises, it would have been a personal covenant obligatory upon those expressly bound by it, and not running with the land, of course it will not be supposed that the want of a covenant on the part of the tenants to improve, places the complainant in a better situation than if it had been made. There can be no pretence then for saying that the covenant of Whitmel H. Boyd to pay for improvements left upon the premises at the expiration of the lease run with the estate, and charges the assignee of the reversion. A partial attempt has been made to sustain the complainants right to relief upon this point, upon the construction of statute of 32d, Henry 8th, ch. 34, which it is said expressly gives this action. That statute was passed to alter the common law principle, that covenants run with the land, but not with the reversion, and to give an action in such a case, both for and against the assignee of the reversion, and although as is observed in the commentary upon Spencer's case, in 3 Law Library, the words of this act are very general, and taken literally would comprehend every covenant expressed in the lease; yet, Lord Coke, in the conclusion of Spencer's case, says, it was resolved to extend to covenants which touch or concern the thing demised and not to collateral covenants. The same construction

[Bream, et al. vs. Dickerson, et al.]

is given to the statute by Lord Kenyon in delivering the opinion of the court in the case of *Webb vs. Russell*, 3 Term Rep. 393: it cannot then be extended further, and does not cover the complainant's case.

2d. Does the reservation of the power by Whitmel H. Boyd the lessor, "to pay the value of improvements in one, two and three years, or at his election, to pay the same out of the rents of said improvements, if they would rent for an amount sufficient to pay it," create an equitable charge upon the estate so as to warrant the complainants in seeking satisfaction for their demand out of it? We think not. There are no words by which the charge is expressly created, nothing in the nature and circumstances of the contract, for which it can be implied. No security from Boyd was either asked or desired: the lessees were satisfied of his personal responsibility, and willing to rest upon it. The right to pay out of the rents, Boyd reserved for his own benefit, in case he should find it more convenient than to pay it himself. There is nothing from which it can be said, that if he chose to pay by the rent, the lessees were to continue in possession; he might immediately upon the expiration of the lease, have rented to other tenants, and appropriated the proceeds to the discharge of the complainants' demand, and that without asking their consent. But as it is said, that he has reserved the power to pay personally, or out of the rents, and no election having been made as to the mode, the complainants have a right to keep possession of the premises and pay themselves. When it is determined that the assignees of the reversion, take the estate discharged from any liability upon the covenant, it necessarily follows, that they are entitled to the possession immediately upon the expiration of the lease, and of consequence to the rents and profits. When the reversion was assigned, the lessor of the complainant and those representing him, lost the power of electing to pay out of the rents, for their interest in the estate was gone, and they were necessarily left personally liable for the demand, and might have been sued upon the covenant to pay in one, two and three years.

We are, then, of opinion, that in no point of view, in which this case can be looked at, are the complainants entitled to any relief against these defendants. We, therefore, reverse the decree of the chancellor, and dismiss the bill.

RUSSELL vs. PYLAND.

A note given to secure the payment of money, won on an election is void; and this is so, whether the persons wagering were electors or not, and whether the wager was made before the election or afterwards.

William J. Pyland instituted an action of debt in the circuit court of Marshall county, on the 2nd day of October, 1839, against John Russell, upon a note executed to Pyland by Russell, for the sum of \$1000. The defendant pleaded that the note was won of him by the plaintiff in a wager on the election of Governor of the State of Tennessee, in the year 1839, and was without consideration. Upon this plea issue was taken and the cause was submitted to a jury of Marshall county at the September term, 1839; upon the proof introduced and under the charge of judge Dillahunt, the jury returned a verdict for the plaintiff for the amount of note, \$1000, and \$69 90 damages. The defendant moved the court for a new trial, on the ground, that the verdict was contrary to the evidence in the cause. This motion was overruled and a judgment rendered in favor of the plaintiff for debt and damages, from which defendant, Russell, appealed in error to the supreme court. The facts of the case are fully set forth in the opinion of the court.

Meigs and Venable, for the plaintiff in error, cited *Allen vs. Hearne*, 1 T. Rep. 50: *Rust vs. Gott*, 9 Cowan, 169: 5 Wen. 250.

Pillow, for the defendant in error.

REESE, J. delivered the opinion of the court.

This is an action of debt upon a note, made by the plaintiff in error, and payable to the defendant for one thousand dollars. Two pleas were filed, which in substance, state that Russell and Pyland, previous to the election for Governor of the State of Tennessee in the year 1839, being themselves electors in that election, bet and bargained with each other, upon the result of the election, the said Russell, the sum of one thousand dollars, that Newton Cannon would be elected Governor, and the said Pyland, the sum of five hundred dollars, that James K. Polk would be elected; and that said note was given in consequence of said bet, and as a security for its payment, if the same should be lost. On the trial, two

[Russell vs. Pyland.]

witnesses proved, that they heard Pyland admit that the note sued on, had been bet on the election. Another witness, William S. Anderson, proved that on the day of the election, for Governor, in August, 1839, the plaintiff and defendant came to him about 12 o'clock and placed in his hands the note sued upon, and a note on one Cotley, for five hundred dollars, and told him if Polk was elected Governor, that witness was to hand the notes over to Pyland, but that if Cannon was elected Governor, to give them to Russell. He proved also, that they were electors in that election.

The bill of exceptions states, that the charge was satisfactory. A verdict was found for the plaintiff, which the court on motion, refused to set aside. As the evidence was all on one side, and fully established the truth, in substance, of the pleas, we are unable to perceive the ground on which the verdict was permitted to stand. If it be said in such cases, the parties are in *pari delicto*, then the defendant, who seeks to set aside a security void on grounds of public policy, and to resist an illegal demand, is in the better condition of the two. In the case of *Allen vs. Hearne*, 1 Term Rep. 56, a wager between voters, with respect to a member of Parliament, laid before the poll began, was decided to be illegal, on the grounds, that it was corrupt and against the fundamental principles of the British constitution, that it was a gaming contract not to be encouraged, and of dangerous tendency. And judge Van Ness, in the case of *Buren vs. Richer*, 4 John. Rep. 435, referring to the above case very properly observes, "that, if for such reasons, a bet of this description was considered to be void in England, how much is their force increased, when applied to an analogous case in our country, in which the very existence of every department of the government depends upon the free, and unbiassed exercise of the elective franchise." We are not left here, however, as in New York, in the case last referred to, and in the case of *Rust vs. Gott*, 9 Cowan, 169, to general reasonings of a moral and political character, nor can we, as they, be embarrassed, by such questions, as whether the wager took place before or after the election; whether those who wagered, were electors or not, or whether they had voted or not. Because our legislature, in 1823, with a wise and prudent forecast, and with an elevation and purity of political morals, worthy of all praise, cut off by the roots, and at one blow, all such distinctions, when they declared, (ch. 23, sec. 2,) "that any person or persons, who shall make any bet or wa-

[Williamson vs. Webb.]

ger of money, or other valuable thing, upon any election in this State, shall be guilty of a misdemeanor, and upon conviction thereof, on indictment or presentment, shall pay a fine," &c. Here we see a bet, or wager upon an election, is placed upon the footing of actual gaming in other cases. The legislature justly viewed it as a great evil. It may lead to bribery and corruption; but short of that, how revolting it is to witness, the mean, sordid and mercenary motives of the gambler mingling themselves in the exercise of the elective franchise, which should be entirely guided and controlled by a liberal and enlightened patriotism. The note then, in this case, was illegal and void by the principles of common law itself, and the taking and giving it upon a wager, on an election, an indictable offence by the statute. Why then, should not the verdict be set aside in this court? There is no question of preponderancy in the proof, no weighing of the testimony, no intendment in favor of the verdict. There is nothing to sustain the verdict, nothing upon which it can stand, and it must, therefore, be set aside, and a new trial granted.

WILLIAMSON vs. WEBB.

1. Where the sheriff permitted a defendant in a *ca. sa.* to escape and motion was made against such sheriff under the act of 1803, ch. 18, sec. 3, for the amount of money specified in the *ca. sa.*: Held, that it was not necessary for the plaintiff to produce the sheriff's bond to authorise a judgment against him; his election, qualification, execution of a bond constitute him sheriff, and as such he is liable without reference to the bond.

2. The cause of action existed against the sheriff, so soon as he permitted the defendant in the *ca. sa.* to escape, and if a recorded bond was offered at the time of the trial, it was admissible evidence against the sheriff and his securities, though it may not have been recorded at the time of the making of the motion.

William Williamson recovered a judgment at the February term, 1839, of the circuit court of Giles county, against Joel S. Carter, for the sum of \$150 damages and \$65 costs. On this judgment a *ca. sa.* was issued on the 23d January, 1840, which came to the hands of J. A. Jackson, a deputy of the sheriff of Giles county, Thomas S. Webb. Jackson arrested Carter by virtue of this writ, on the 15th day of February following, and took the bond of J. S. Car-

[Williamson vs. Webb.]

ter and M. Carter, in the sum of \$359, conditioned that Joel S. Carter should "appear before the judge of the circuit court of Giles county, at the court house in the town of Pulaski, on the third Monday in February, 1840, to answer W. Williamson of a plea of damage, that he render to him the sum of \$150 damages and \$65 costs, and then and there to satisfy the judgment of the court, or render himself to the custody of the sheriff." Upon the execution of the bond Carter was discharged by the deputy from custody. It does not appear that any proceedings were had at the February term, but at the June term, 1840, Williamson, by his attorney, moved the court for judgment against Webb, "as of the February term," for suffering the said Joel S. Carter to escape. The plaintiff read the *ca. sa.*, the bond taken by Jackson and the sheriff's bond, and introduced Jackson, who proved the arrest, and discharge. There was no certificate to the sheriff's bond showing, that it had been recorded.

The defendant then introduced the clerk of the county court, who testified, that the sheriff's bond had not been recorded till the 2nd day of March, 1840, and after the motion had been made. Dillahunt, the presiding judge, gave judgment in favor of the defendant, from which judgment the plaintiff appealed in error to the supreme court.

Combs, for plaintiff.

1. The bond taken by Jackson was void. *Vide* act of 1824, ch. 17: 1825, ch. 57, N. & C. 394, directing how *ca. sa.* bonds shall be taken. The bond taken in this case, not being authorised by any statute, was wholly unavailable to the plaintiff in the execution and the taking of such bond and discharge of the defendant thereupon was an escape. 3 Haywood, 144.

2. The plaintiff has his remedy by motion. *Vide* act of 1803, ch. 18, N. & C. p. 294.

3. The sheriff himself would be liable, though his bond were not recorded.

Neil S. Brown, for the defendant.

1. By the act of 1777, ch. 8, sec. 2, it is provided, that "said bond, (the bond of the sheriff,) every county court is hereby required and empowered to demand, and take and cause to be acknowledged before them in open court and recorded; and upon a breach

[Williamson vs. Webb.]

of the condition of such bond, the party or parties injured, may maintain an action thereon."

This is one of the requisites laid down by the act which prescribes, that the sheriff shall give bond, and is a part of the same section; and this court have decided, "that if a statutory bond do not pursue the directions of the statute, the summary remedies given upon it by the statute cannot have effect." See *Goodwin vs. Sanders and Read*, 9 Yer. 91; also, *Porter vs. Webb*, 4 Yer. 161: and *Cheatham vs. Howell*, 6 Yer. 311.

Now the record shows, that at the time the motion was made in the circuit court, the bond of the sheriff was not recorded, "and how," in the language of this court, (in the case of *Goodwin vs. Sanders and Read*, above cited) "could the clerk of the county court of Giles, of a bond unacknowledged in open court, and unrecorded, give an authentic or official copy, constituting the basis of this proceeding?" It is true, the bond was recorded afterwards, and before the motion was finally heard, but the motion was entered, the suit commenced, bottomed upon the bond, as it then was. If a summary remedy cannot be had against a sheriff, upon his unrecorded bond, can the recording of the bond, after suit is commenced, have a retrospective effect, and make that good and operative, which otherwise would be null and void?

This court have decided, in the case of *Goodwin vs. Sanders and Read*, "that the principle is the same, where the variances from the statute, were in the terms and stipulations of the bond, in the persons to whom made payable, &c. as where the bond had not been recorded." Now suppose a sheriff were to give a bond, payable to the secretary of State, and a motion were made against him upon it, and before the motion was disposed of by the court, the sheriff were to correct his bond and make it payable to the Governor, or make a new bond payable in like manner, could the motion be sustained, and could judgment be properly rendered under such circumstances? Certainly not.

At the time the motion was entered, there was no sheriff's bond, for all purposes of summary remedy. The question might be different, if the motion had even been withdrawn and entered anew after the bond was recorded.

2. Again, it does not appear upon the face of the record, that the sheriff's bond has ever been recorded. It has been exhibited, and made a part of the record, but the clerk's certificate does not ap-

[Williamson vs. Webb.]

pear upon it. "In a proceeding by motion against the sheriff for the non-return of process, under the act of 1803, ch. 18, every fact necessary to a recovery, must appear upon the face of the record, to give the court jurisdiction." See *Porter vs. Webb*, 4 Yer. 161.

The bill of exceptions states, that the bond was recorded after the motion was made, but before it was decided by the circuit court; but the bond itself, which is pretended to be exhibited, does not show the fact. The case then, before this court, is, as though the bond had never been recorded and the mere statement of that fact, in evidence, cannot supply the defect.

GREEN, J. delivered the opinion of the court.

This is a motion against the defendant, sheriff of Giles county, under the act of 1803, ch. 18, sec. 3, which authorises a judgment by motion against a sheriff, who shall permit a defendant to go at large, that has been arrested by virtue of a *ca. sa.*

There is no dispute, but that the defendant in the *ca. sa.* was arrested and then permitted to go at large, nor is it contended that the bond, which was taken by the sheriff, is of any force. The motion was made at the June term last, but the record says it was entered then, for the preceding term. It appears from the testimony of the clerk of the county court, that the sheriff's bond was not recorded until after the February term, but was recorded before the June term. It is insisted, that as the bond was not recorded, until after the motion was entered, although the record was regularly made before it came on to be heard, and determined, the motion must fail.

We cannot concur with this argument. The default of the sheriff, constitutes the cause of action, and not the recording the sheriff's bond. That was only necessary as evidence to authorise a judgment against the securities, and if before the trial, it were done, and a certified copy of the bond exhibited, that would be sufficient. But whether the bond had been recorded or not, the sheriff himself would be liable. His election, qualification and execution of a bond, constitute him sheriff, and as such, he is liable for any default, without reference to the bond. It need not be produced to authorise a judgment against him; so that, in either view of the case, a judgment should have been rendered for the plaintiff. The judgment will be reversed, and this court proceeding to render such

[Hinkle vs. Currin.]

judgment as the circuit court should have given, order that judgment be entered for the plaintiff, for the debt and costs mentioned in the *ca. sa.*

HINKLE vs. CURRIN.

1. A garnishee is entitled to defend himself by the statute of limitations, and all other legal defences which he has against the suit of his creditor.

2. Where a judgment was rendered in the county court against a garnishee, from which there was an appeal to the circuit court; the garnishee may insist upon the statute of limitations or any other legal defence arising upon the facts disclosed, although he did not insist upon such defence upon his examination in the county court or offer to make it by plea.

3. Where a garnishee acknowledged in his answer that he had transferred his stock in a banking company, to the company, for the purpose of evading responsibility to the creditors of the institution: Held, that this was not such an acknowledgment of a subsisting debt as would take the case out of the statute.

At the June term, 1840, of the circuit court of Lincoln county, Robert P. Currin recovered a judgment against Joseph Hinkle for the sum of one thousand and nineteen dollars and eighty cents and costs. From this judgment Hinkle appealed in error to the supreme court. All the material facts of the case are disclosed in the opinion of the court.

J. Campbell, for plaintiff in error.

F. B. Fogg, for defendant in error.

GREEN, J. delivered the opinion of the court,

At the April term, 1829, of the Lincoln county court, the defendant in error obtained a judgment against the Fayetteville Tennessee Bank for nine hundred and ten dollars, upon which an execution issued. On the 24th of March, 1835, another *fi. fa.*, issued, on which the sheriff returned, "No effects of the Fayetteville Tennessee Bank found in my county, on which to levy this *fi. fa.*, garnisheed Joseph Hinkle and Elliot Hickman, which is herewith returned." The garnishee-summons issued the 14th of April, 1835.—Hinkle appeared and answered interrogatories.

The material facts stated in his answer are, that in 1820, he was

[Hinkle vs. Currin.]

owner of seventy-four shares of the stock of the Fayetteville Tennessee Bank, upon which he had paid one thousand eight hundred and fifty dollars; and that he had borrowed, in addition to other sums, three thousand dollars, for which the bank discounted his note, and all of which he had paid, except the sum of one thousand eight hundred and fifty dollars, the amount which had been paid on his stock; that by an agreement with the bank, in 1821, he had transferred all his stock to the bank, and the bank gave up his note for his stock. When these transactions occurred he was solvent, and able to pay, and the transfer was made to avoid further responsibility as a stockholder in said bank. He does not think he is indebted to the bank.

Upon these facts the county court, by virtue of the act of 1821, ch. 197, gave judgment against Hinkle; from which he appealed to the circuit court. In the circuit court it was agreed that he might rely on the statute of limitations as if pleaded, provided he could at that time file such plea. The circuit court rendered judgment against him, from which he prosecutes his appeal in error to this court.

1. The first question is, could Hinkle, the garnishee, rely upon the statute of limitations in his defence, although he did not, upon his examination, insist upon that defence, nor offer to make it by plea in the county court. We think he had a right, in the circuit court, to insist upon this defence. The proceedings by garnishment are peculiar. There are no pleadings drawn out in writing, on either side. The execution against the original debtor, the garnishee-summons and the declaration of the garnishee constitute the case. The pleadings are *ore tenus*. Each party insists before the court upon the legal questions, whether for judgment or for defence that may arise upon the facts stated. It is not necessary that the garnishee upon his examination shall insist upon every matter of defence which may legally exist upon the facts he discloses. He is called upon to disclose the facts in relation to his indebtedness. This he can do without the assistance of counsel. But to say that he can make no defence, that he does not himself rely upon his examination, would be to entrap ignorant men, not informed of the defence they ought to make, and render them liable in cases where, by the law, no judgment ought to be rendered.

2. But it is said that this plea cannot avail the present case, because the answer of Hinkle acknowledges a subsisting debt. In

[Hinkle vs. Currin.]

this position the counsel is mistaken as to the fact. He says expressly he does not think he is indebted to the bank. If the disclosure that he had transferred the stock to avoid responsibility, should be considered as evidence of fraud, that would render that transaction void as to creditors; still this is a history of the transaction upon which the law would create him debtor to the bank for the benefit of the creditors, and not such an acknowledgment of a debt as would take the case out of the statute, if the bank were suing and there were no impediment of fraud in the way of a recovery.

3. It is contended that a garnishment is not such an action as will admit of the plea of the statute of limitations. It is true, this proceeding is not mentioned in the statute, but it would be strange if after a debt has been barred by the statute of limitations, so that the original creditor could not recover it, the debtor might be summoned by an execution-creditor of his creditor, and be stripped of a defence, which would be a complete protection, had his creditor sued. We think, that as this proceeding is in effect, the prosecution of the claim of the creditor by means of the garnishment, the debtor is entitled to all the defences upon the garnishment which he could make against his creditor had he sued, except such as might exist against a creditor in consequence of collusion with his debtor to avoid the payment of his debts. The time, therefore, that would bar the demand as between a debtor and his immediate creditor may be relied on, and constitutes a good defence for the debtor when garnisheed.

4. But it is said the statute does not apply here because this was a debt for stock that is due at any time, whenever the directors may call for it. But this demand is not of the character suggested in this proposition. Here Hinkle had given his note for his stock, which the bank held, and which he was liable to pay at any time it might be demanded. This note was given up in 1821, and the stock transferred, and the whole matter was settled between him and the bank. The garnishee-summons issued fourteen years afterwards. The bank could not recover, were the question of fraud out of its way; and to allow Currin to do it, would be placing him in a better situation than the creditor of Hinkle could possibly have been.

We think the judgment should be reversed, and order it accordingly.

WILKINS vs. GILMORE.

1. If a slave or servant commit a trespass by the command or encouragement of the master, the master is guilty of the trespass.

2. In the action of trespass the jury are not restrained in their assessment of damages to the amount of mere pecuniary loss sustained by the plaintiff, but may award damages in respect of the malicious conduct of the defendant and the degree of insult with which the trespass has been attended.

3. Where the supreme court is not informed by the nature of the case or by a statement in the bill of exceptions that it contains all the evidence submitted to the jury, the court will presume that the evidence justified the verdict.

Gilmore instituted this action of trespass against Wilkins in the circuit court of Maury county, on the 13th of September, 1839, by virtue of the provisions of the act of 1821, ch. 22, made for the benefit of poor persons. At the January term, succeeding, the defendant pleaded not guilty; and the cause was submitted to a jury, Judge Dillahunty presiding, at the May term.

It appeared in evidence, that Wilkins had leased a portion of land, and some houses thereupon, to plaintiff, Gilmore, for the term of three years, and that before the expiration of the lease, Wilkins had become dissatisfied with his tenant; that about the 15th of March, 1839, a slave, or a white man blacked so as to resemble a slave, came to the house in which Gilmore and his family resided and threw off the roof. Gilmore and wife were absent, but a young lady and the children of Gilmore, five in number, were present and expostulated against the violence. This was, however, disregarded, and the roof of the house thrown off and the children and furniture of Gilmore exposed to the rainy and inclement weather.

There was no conclusive and positive proof as to the identity of the person by which this deed of violence was done, but much circumstantial testimony in regard thereto was submitted to the jury, which it is needless here to set forth. The judge charged the jury, that if the slave of Wilkins threw off the roof of the house by the command or procurement of Wilkins, Wilkins was liable for the injury done, and that the jury in their assessment of damages were not confined to the actual amount of pecuniary loss sustained by the plaintiff, but that they were authorised to award damages in respect of the malicious conduct of the defendant. The jury rendered a verdict in favor of the plaintiff for the sum of \$250.

[Wilkins vs. Gilmore.]

The defendant moved the court for a new trial. The plaintiff then came in and remitted the sum of \$100 of the said damages, and the court overruled the motion for a new trial, and rendered judgment for \$150. The defendant appealed in error.

Nicholson, for plaintiff in error.

Dew, for defendant in error, cited, 1 Black. Com. 431-2, *Campbell vs. Stairer*, 2 Murphey's Rep. 389, *McManus vs. Crocket*, 1 East, 106, to show the liability of the master for the acts of his slave, done by command or procurement of his master, and 3d Starkie, 1450, in reference to the power of the jury over the question of damages in an action of trespass.

GREEN, J. delivered the opinion of the court.

This is an action of trespass for throwing off the roof of plaintiff's house in his absence, and exposing his children to the weather. The court charged the jury, in substance, that if the act was done by the defendant's slave, by the procurement, authority, or command of the defendant, he would be liable in this action, as though he had done the act himself. If the jury should find for the plaintiff, they would not be confined in the assessment of damages, to the actual pecuniary loss of the plaintiff, but might give exemplary damages.

1. As to the first proposition in this charge, that the action of trespass will lie, for an injury done by another, by the command, authority or procurement of the party charged, there can be no doubt. Whoever procures or commands another to commit a crime, or do a civil injury, is guilty of the offence himself, as a principal in the first degree. Hence if a slave, or servant, commit a trespass by the command or encouragement of the master, the master is guilty of it. 1 Black. Com. 431-2: *Campbell vs. Stairer*, 2 Murphy's Rep. 389: *McManus vs. Crocket*, 1 East Rep. 106.

2. The second proposition is equally clear. In an action of trespass, the jury are not restrained in their assessment of damages, to the amount of the mere pecuniary loss sustained by the plaintiff, but may award damages, in respect of the malicious conduct of the defendant, and the degree of insult with which the trespass has been attended. 3 Starkie, 1450.

3. As to the facts of the case; we are of opinion, the evidence

[Price vs. Uphaw.]

contained in this record, well warranted the verdict against the defendant: but if that were not so, we are not informed by any statement in the bill of exceptions, or by the nature of the case that all the evidence has been set out, and consequently, we are to presume that there was enough to justify the verdict of the jury. Let the judgment be affirmed.

PRICE vs. UPSHAW.

To enable the plaintiff to protect himself from the operation of the statute of limitations, by the saving in favor of accounts concerning the trade of merchandize between merchant and merchant, their factors or servants, the subject matter of the account must be concerning the trade of merchandize between merchant and merchant, their factors or servants, and there must be mutual and reciprocal accounts between the parties.

Combs, for plaintiff.

Wright, for defendant.

TURLEY, J. delivered the opinion of the court.

Price sued Uphaw in trespass on the case upon an account of more than three years standing. Uphaw pleaded the statute of limitations, to which the plaintiff replied in substance, that at the time of the transaction and account about which the suit was brought, the plaintiff was a merchant in the city of Nashville, and that the defendant was a merchant in the town of Pulaski, and the account and demand sued for in this case concerned the trade of merchandize, between the plaintiff and defendant as merchant and merchant.

Upon this replication there was issue, and a verdict for the defendant. Plaintiff entered a motion for a new trial, which was overruled. The bill of exceptions shows that the account sued on was for goods delivered by plaintiff to be sold on commission, and the proceeds accounted for, after deducting the commissions, and that the defendant sold the goods and collected the money.

The court charged the jury, that to enable the plaintiff to protect himself from the operation of the statute of limitations by the saving in favor of accounts, concerning the trade of merchandize between merchant and merchant, their factors or servants, the subject

[Cummings vs. Freeman.]

matter of the account must be concerning the trade of merchandise between merchant and merchant, and that there must be mutual and reciprocal accounts between the parties.

The question is, whether this charge is right. We think it is; the weight of authority is decidedly in its favour. The question is carefully investigated in the case of *Coster and others vs. Murray and others*, 5 Johnson Ch. Rep. in which Chancellor Kent says, "to bring a case within the exception of the statute, there must be mutual accounts and reciprocal demands between the parties." In the case of *Spring and others vs. The Executors of Gray*, 6 Peters, the English and American authorities are carefully examined and ably commented upon by Chief Justice Marshall, and the same conclusion drawn from them, that is announced by Chancellor Kent, in the before mentioned case of *Coster and others vs. Murray and others*. There is then, no error in the proceedings of the circuit court, and the judgment will be affirmed.

CUMMINGS vs. FREEMAN.

Cummings executed and delivered to Freeman an instrument of writing in the following words: "Due Joseph J. Freeman, two hundred dollars, borrowed October 21st, 1836, C. W. Cummings:" Held, that the acknowledgment of indebtedness in this writing implies a promise to pay and constitutes it a promissory note.

Joseph J. Freeman instituted this action against Charles W. Cummings in the circuit court of Wilson county, and at the June term, 1840, Judge Anderson presiding, a judgment was rendered in favor of the plaintiff, from which the defendant appealed in error to the supreme court.

Caruthers, for plaintiff in error, cited *Read vs. Wheeler*, 2 Yer. 50.

O. Ready, for defendant in error, cited *Kimball vs. Huntingdon*, 10 Wend. 675: *Russell vs. Whipple*, 2 Cow. 536: *Sexton vs. Johnson*, 10 Johnson Rep. 321: *G. Turnpike Co. vs. Horton*, 9 J. R. 217: *Hughes vs. Wheeler*, 8 Cow. 77: *Jerome vs. Whitney*, 7 John. Rep. 321.

[Cummings vs. Freeman.]

GREEN, J. delivered the opinion of the court.

This is an action of debt. The declaration alleges, that, "on "the 21st day of October, 1836, the defendant (Cummings) made "and delivered his certain promissory note, to the court shown, "bearing date of that day, and then and there promised to pay, on "the day and date aforesaid, to the said Joseph J. Freeman, two "hundred dollars, borrowed money." To this declaration the defendant pleaded, "*nil. debet.*" The plaintiff offered in evidence, a writing in the following words, namely:

"Due Joseph J. Freeman two hundred dollars borrowed, October 21, 1836. C. W. CUMMINGS."

To the reading said paper in evidence, the defendant objected, on the ground of variance between the paper offered and the note described in the declaration. The objection was overruled, to which decision, exception was taken. There was a verdict and judgment for the plaintiff, from which the defendant prosecuted this appeal in error. The only question, now for the decision of the court is, whether this paper is a promissory note under the statute. If so, it is substantially set out in the declaration. In the case of *Kimball vs. Huntingdon*, 10 Wend. R. 675, the writing sued on, was in these words: "Due Kimball and Kiniston three hundred and twenty-five dollars, payable on demand, October 20th, 1821," and signed by the defendant. The court held, this was a promissory note. They say, "the instrument is a promissory note within the statute, as it contains every quality essential to such paper. The acknowledgment of indebtedness on its face implies a promise to pay the plaintiffs. Neither the acknowledgment of value received, or negotiable words are essential to bring this paper within the statute." In the case of *Russell vs. Whipple*, 2 Cow. R. 536, the paper sued on, was in the following words, namely: "Due Lawson Russell, or bearer, one day from date, two hundred dollars, twenty-six cents, for value received, as witness my hand, this 6th day of January, in the year of our Lord, 1823." This paper was set out in the declaration; to which the defendant demurred, assigning for reason, that this was not a promissory note within the statute. The demurrer was noticed as frivolous, and being brought on, out of its place on the calender, the court thought it too plain for argument in its regular order, and rendered judgment for the plaintiff. These cases do not differ in principle from

[Roberts vs. Rose, et al.]

the one now before the court, and we should have deemed it too plain for serious debate, were it not that the case of *Reed vs. Wheeler*, 2 Yerg. R. 50, stands in our way. In that case the declaration stated: "That the said Tho's. J. Read, by his certain note in writing, his own proper hand being thereto subscribed, acknowledged that there was due by him to the said J. J. Wheeler, the sum of fifteen hundred and thirty dollars, sixty-three cents, value received." The judgment was arrested on the ground assumed in the opinion, that there was no consideration stated in the declaration, but the court must have held, that this was not a promissory note, for, if it had been so considered, it would *prima facie* have imported a consideration, and the declaration need not have averred it. If the note, in this case, be not a promissory note, within the statute, then no form of expression will constitute one, unless the writing contain an *express promise* to pay.

But the cases before referred to, and many others, cited in those cases, constituting a current and weight of authority not to be resisted, hold the contrary doctrine. They hold, that the acknowledgment of indebtedness implies a promise to pay, and constitutes the writing, containing such acknowledgment, a promissory note.

The determination of our judgment, is in accordance with the weight of authority, and however reluctant we may be, to overrule a decision of this court, which has been deliberately made, and published, yet we think, that as no mischief can result from changing the rule of decision in this instance, we ought not to be deterred from pronouncing the law, as it is established by reason and by authority. Let the judgment be affirmed.

ROBERTS vs. ROSE & MATHEWS.

1. A vendor who conveys land can have no lien or priority of satisfaction for the unpaid purchase money over other creditors of the vendee.

2. Adams, a security in a bill single, confessed judgment in favor of the obligee and took judgment by motion against the principal: Held, that such judgment was valid.

Ephraim Roberts sold a tract of land, containing sixty acres, in the county of Robertson, to Henry J. Mathews, on the 11th day of

[Roberts vs. Rose, et al.]

March, 1836. Roberts made a deed in *fee-simple* to Mathews, warranting and defending the title to him and his assigns, &c., and took Mathews' obligation to pay him one hundred and seventeen dollars, ninety-seven cents, one day after the date thereof. Mathews failed to pay this obligation, became insolvent and left the State, on the 10th of December, 1837. Dudley S. Adams being the security of Mathews in an obligation executed by them to W. Gardner, for the sum of one hundred and fifty-nine dollars and fifty cents, appeared in the circuit court of Robertson county, on the 6th day of September, 1837, and confessed a judgment in favor of Gardner for the amount of the note and interest thereupon. Adams immediately moved the court for a judgment over against Mathews, and a jury being empaneled and having determined that Adams was the security of said Mathews in the said obligation, a judgment was rendered against Mathews and in favor of Adams for the amount rendered against him. A *fi. fa.* was issued on this judgment and levied on the tract of land sold by Roberts to Mathews. The land was sold at Springfield, in the county of Robertson, by the sheriff thereof, on the 25th of April, 1838, and Reuben Rose became the purchaser thereof, for the sum of one hundred and forty-seven dollars. The sheriff conveyed the land to Rose and he took possession.

Roberts filed his bill in the chancery court, at Gallatin, on the 9th April, 1839, against Mathews and Rose, charging that Rose was a purchaser with full knowledge of the fact, that the purchase money due him was unpaid, and praying a subjection of the land to the satisfaction of his debt. Rose answered and denied all knowledge of the fact, that the purchase money was unpaid at the time of his purchase. It was however fully established in proof.

The cause came on to be heard before the Chancellor, at the April term, 1840, who being of the opinion, that by the sale and conveyance of the land to Mathews, Roberts lost all lien upon the same for the purchase money, and that he was entitled to no priority of satisfaction over other creditors, dismissed the bill and taxed complainant with the costs. Complainant appealed.

H. S. Kemble, for complainant.

J. C. Guild, for defendant.

[*Roberts vs. Rose, et al.*]

TURLEY, J. delivered the opinion of the court.

Two questions are raised in this case:

1st. Whether the lien which the law gives to the vendor of real estate as security for the payment of the purchase money against the vendee, and subsequent purchasers with notice, can be enforced against a purchaser under an execution upon a judgment against the vendee?

2dly. Whether a judgment confessed by a security without service of process is void, and therefore renders invalid a judgment on motion against his principal?

The first question has been elaborately examined by this court in the case of *Gann vs. Chester & Blair*, 5th Yerg. Rep. 205, where it was held, that "a vendor, who conveys land, can set up no lien, nor have any priority of satisfaction, for the unpaid purchase money, over other creditors of the vendee." We concur in this opinion.

The second question rests upon the construction of the 3d section of the act of 1801, ch. 15, which provides in substance, that the court shall not permit a security to confess a judgment, so as to harass his principal, provided that he will come in and indemnify him against future loss. It is probable, that it would be the duty of the court, if it knew that the person who proposed to confess the judgment was a security, and that he was doing so for the purpose of harassing his principal, not to permit him to confess the judgment, when no process had been served, till notice had been given to the principal. But it is difficult to perceive, if the court permitted the confession of the judgment, how it could be declared void; and it is still more difficult to perceive how it would have been possible for the court in this case, as well as in most of the like kind, to know whether the person proposing to confess a judgment was a security or principal.

The statute is directory to the court, and a neglect to enforce its provisions, cannot be held to vitiate the judgment.

Let the decree of the chancery court be affirmed.

BELL vs. STEEL.

Bell leased a furnace and forge to S. & C. to be returned in good repair. S. & C. dissolved partnership; C. taking the forge and S. the furnace for the residue of the term. C. delivered up the forge in good repair, and S. the furnace in a dilapidated condition. Bell sued S. on his covenant, and the counsel of Bell, under the belief that it was necessary to qualify Collier as a witness, advised a release of him by Bell, which was accordingly executed and delivered. Steel, thereupon, pleaded this release in discharge of himself: Held, on bill filed by Bell to restrain S. from setting up this release:

1. That the discharge of one obligor by the obligee, operates as a discharge of the other.

2. That ignorance of the law shall not affect agreements, nor excuse from the legal consequences of particular acts in a court of chancery.

3. That the exceptions to this general rule are few and will be found generally connected with circumstances of imposition, misrepresentation, undue influence, misplaced confidence, &c.

This is an appeal from a decree of the chancery court at Charlotte, dismissing the bill of complainant Bell, upon a hearing on bill, answer and replication.

Cook, for complainant.

Boyd, for defendant.

TURLEY, J. delivered the opinion of the court.

Complainant leased a forge and furnace for a term of years to Anderson, Steel and Collier, taking from them a covenant to return the forge and the furnace at the expiration of the lease in good repair; shortly after the lease Anderson withdrew from the firm, and Steel and Collier, not long afterwards, dissolved the partnership, and by mutual agreement Collier took the forge and Steel the furnace for the residue of the term. At the expiration of the lease Collier delivered up the forge in good repair, and Steel the furnace in a ruinous and dilapidated condition. Complainant brought his action on the covenant to return the works in good repair against Steel, and upon a trial at law, he and his counsel being desirous to have the benefit of the testimony of Collier, and believing that it would not be allowed them without a release from complainant of all right to hold him responsible upon the covenant, one was prepared and executed. Immediately upon the delivery of the release to Collier, the attornies of Steel applied to the court for leave to

[Bell vs. Steel.]

plead the release since the last continuance in discharge of him, which was allowed; and this bill is filed to restrain Steel from setting up the defence, it being inequitable and unconscientious, it is said, in him to do so. It is now argued that Steel was not injured by the release; that in as much as he and Collier had dissolved partnership, and he had taken sole possession of the furnace, he was legally bound to hold Collier harmless from any loss he might sustain by reason of the furnace not having been returned in good repair; that being so bound, he would have no right to contribution from Collier for any damages he might individually pay for any breach of the covenant, to return in good repair, and, therefore, cannot complain of the execution of the release to Collier, and ought not to be permitted to set it up in his defence. That Steel was bound, as between himself and Collier, to pay individually, any damage that might be recovered for a breach of the covenant, in not returning the furnace in good repair, and that, therefore, Collier could have, in all probability, been examined as a witness without a release, is certainly true. It is equally true, that Steel in setting up the release in his own discharge, is availing himself of a defence, to say the least of it, of very doubtful propriety; yet, still, we have looked in vain for a place to stand upon, in an attempt to restrain him from its use. There is no principle of chancery jurisdiction, that we are aware of, warranting such a proceeding. It has been attempted by the counsel of the complainant to sustain the jurisdiction of the court, upon the ground that the release was hastily and improvidently made; but even if the principle, which runs through a class of cases upon the subject of hasty and improvident contracts, could be made to apply to a case of this kind, yet, upon an examination of the authorities upon the subject, we are satisfied that the complainant has not brought himself within their operation. It is a well known maxim, that ignorance of law will not furnish an excuse for any person, either for a breach or omission of duty: and Mr. Story in commenting upon this principle, in the 1st vol. of his equity jurisprudence, sec. 111, says, "The presumption is, that every person is acquainted with his own rights, provided he has had a reasonable opportunity to know them, and nothing can be more liable to abuse, than to permit a person to reclaim his property, upon his mere pretence, that at the time of parting with it he was ignorant of the law acting on his title." Mr. Fonblanque accordingly lays it down, as a general

[Bell vs. Steel.]

proposition, that "ignorance of law shall not affect agreements, nor "excuse from the legal consequences of particular acts in a court of "chancery:" and he is fully borne out by the authorities. And in the 112th section of the same book, he says, "One of the most common "cases put to illustrate the doctrine is when two are bound by a "bond, and the obligee releases one, supposing by mistake of law "that the other will remain bound. In such a case, the obligee will "not be relieved in equity upon the mere ground of his mistake of "law, for there is nothing inequitable, in the co-obligor's availing "himself of his legal rights; nor of the other obligor's insisting upon "his release, if they have acted *bona fide*, and there has been no "fraud on either side to procure the release." The authorities cited for the support of this proposition are, Comyn's Dig. Chan. 3, F. 8: 4th Viner's Abr. 387: 1st Fonblanque's Eq. B. 1st, ch. 2, sec. 7, note (v): 1st Peters', 17: 1st P. Will. 723-27: 2d Atkins', 591: 2d John. Chan. Rep. 51: 4th Pickering, 6, 17. This seems to be the very case now under consideration. But further. It is true, that there are some exceptions to the generality of the rule as laid down by Mr. Fonblanque in his equity treatise; but what are they? Mr. Story in the 120th section of his work upon equity jurisprudence, vol. 1st, says, "That upon a close examination of the cases "that have been relieved against, when the party knowing all the "facts, have acted upon a mistake of the law, many, though not "all, will be found to have turned, not upon the consideration of "a mere mistake of the law, stripped of all other circumstances, but "upon an admixture of other ingredients, going to establish misrepresentation, imposition, undue influence, undue confidence, mental imbecility," &c. Again, he says in sec. 137, same book. "We have thus gone over the principal cases, which are supposed to contain contradictions of, or exceptions to the general rule, that ignorance of the law, with a full knowledge of the facts, furnishes no ground to rescind agreements, or to set aside the solemn acts of the parties. Without undertaking to assert, that there are none of these cases which are inconsistent with the rule, it may be affirmed, that the real exceptions are few, and generally stand upon some very cogent pressure of circumstances. The rule prevails in England in all cases of compromise of doubtful, and, perhaps, in all cases of doubted rights, and, especially, in all cases of family arrangements. It is relaxed in cases, when there is a total ignorance of title founded in the mistake of a plain and settled

[Stewart vs. Rickets.]

principle of law, and in cases of imposition, misrepresentation, undue influence, misplaced confidence and surprise. In America the general rule has been recognised as founded in sound wisdom and policy, fit to be upheld with a steady confidence. And hitherto the exceptions to it, (if any,) will be found, not to rest upon the mere foundation of a naked mistake of law, however plain and settled the principle may be, nor upon the mere ignorance of title founded upon such mistake." It will at once be seen from the cursory examination of this question, that there has been no principle adjudged by which complainant can be released. The deed of release was freely and voluntarily executed; it was done in open court, and by the direction of legal counsel; to give the relief would be to make an exception ourselves, to the important rule we have been investigating, startling to the mind, and perhaps in its tendency of the most dangerous consequences; we cannot think of doing it.

The decree of the chancellor, dismissing the bill, will therefore be affirmed.

STEWART vs. RICKETS.

1. An indenture of apprenticeship whether made under the statute or by the parent or guardian, if assigned or transferred, does not bind the apprentice to yield obedience to the assignee or transferee.

2. The statute of 5th Elizabeth is not in force in this State.

3. Where a father binds his infant son an apprentice by covenant, and the son neither joins in the covenant nor dissents therefrom, but performs the stipulated services: Held, that it is not important whether the son was bound to perform the services or not, having rendered them, the master is liable in damages for his breach of the covenant.

4. Can a father at common law bind his infant son an apprentice, without his assent, testified by his execution of an indenture?

Stewart and Rickets entered into a covenant, by which Stewart bound his son Matthew to serve Rickets for the term of six years, and Rickets bound himself to give Matthew six months schooling, treat and clothe him well, and at the expiration of the time, give him a hat and suit of clothes. This contract was signed by Stewart and Rickets, but not by Matthew; neither does it ap-

[Stewart vs. Rickets.]

pear that he dissented from the provisions of it. He entered into the service of Rickets and labored for him for the stipulated period. Rickets did not give him the schooling, nor the hat or clothes which he covenanted to do. Stewart demanded compensation for the failure of Rickets to perform his covenant, which Rickets refused to make. Stewart thereupon instituted this action in the circuit court of Wilson county, against Rickets on the covenant, and a jury rendered a verdict against Rickets for the sum of \$95 25. The circuit judge arrested the judgment on the ground that the action would not lie, and Stewart appealed in error to the supreme court.

R. M. Burton, for Stewart, cited *Day vs. Everett*, 7th Mass., *Nickerson vs. Howard*, 19th John. Rep., and contended that they were decisive of the question involved in the case. The case of *Stringfield vs. Heiskell*, 2 Yer. 546, only decides that a deed of apprenticeship assigned or transferred does not bind the apprentice to the assignee or the transferee. It does not decide that if the infant thought it proper to render the services stipulated in accordance with the deed, that the master was not liable for a breach of covenant in failing to comply with stipulations made for the benefit of the infant. Such a decision would have been contrary to the clearest principles of justice and reason.

Dew, for defendant.

REESE, J. delivered the opinion of the court.

This is an action brought in the circuit court of Wilson county, for a breach of covenant. The covenant, dated on 4th of January, 1833, and signed and sealed by both the plaintiff and the defendant, set forth on the part of the plaintiff, that he bound his son Matthew to the defendant for the term of six years from the date, and that the said defendant on his part covenanted, with the plaintiff, to give to the said Matthew six months schooling, and to clothe and board him well, and when the time of his service should expire, to give him a new suit of clothes and a hat. The plaintiff in his declaration averred, that his son faithfully served the defendant as his bond-servant and apprentice during and to the end of the time stipulated, and alledged as breaches of the contract, that defendant did not give the said Matthew six months schooling, nor treat and clothe him well, nor, at the expiration of the time, give

[Stewart vs. Rickets.]

him a new suit of clothes and hat. The defendant in brief *memoranda*, pleaded, first, that he had performed the covenant, and second, that plaintiff had not performed the covenant precedent on his part. These pleas were replied to in the same manner. The issues were found by a jury in favor of the plaintiff, and they assessed his damages to the sum of ninety-five dollars and twenty-five cents. But on a motion by the defendant for that purpose, his honor, the circuit judge, arrested the judgment, and the plaintiff has prosecuted his appeal in error to this court. We are told at the bar, that the circuit court founded the judgment by it given in the case upon the authority of what is supposed to have been decided in the case of *Stringfield vs. Heiskell*, 2 Yer. Rep. 546. One point determined in that case, and upon which it might well have been left, is unquestionably correct on well settled authority, namely, that an indented apprentice, whether constituted such under the statute, or by the parent or guardian, is not assignable or transferable, so as to create in the apprentice, the duty or obligation to yield his obedience or services to the new master or assignee. But the other conclusion arrived at by the court in that case, and founded upon the very brief and slight notices taken of the subject by Chancellor Kent, Com. 2 Vol. 212, 1st ed't., and in Barnwell and Alderson's Rep. 584, "that a father, at the common law, cannot bind his infant son an apprentice, without his assent, testified by his execution of the indenture"—is much more questionable, if it is to be understood as meaning more than that in such case, the apprentice, if he leave the service of the master, or fail to do his duty, can not be subjected to the coercive remedies given by the statute of Elizabeth, or before the statute, by the law of nature and the common law, to the parent himself. But be this as it may, the court in the case of *Stringfield vs. Heiskell*, were not called upon to decide, and did not in fact decide, that if a father bind a son an apprentice in a covenant of indenture, and the son, although not assenting by joining in the execution of the indenture, does in fact perform the services, that the covenantor shall not be compelled to perform his part of the agreement. Whether the servant and apprentice, were compelled or not, to perform the services, if he does perform them, why shall not the master pay for such services? He must pay, unless the contract is illegal and void. But such a contract is not illegal and void, except by the statute of

[Aymette vs. The State.]

Elizabeth, which it is not contended is in force here, and which the case of *Stringfield vs. Heiskell*, declares not to be in force.

In the absence of any statute, or of any common law principle, to render void such a contract, the question of the covenantor's liability, is too plain for argument. It is briefly this: A. covenants that Matthew, who happens, indeed, to be his son, should work and perform services for a period of six years for B., and B. covenants, that he will do certain things and pay certain sums, for the benefit of the son, (as it happens to be in this case,) and the services having been performed, he insists it is unlawful for him to pay the amount stipulated, or to perform his covenants. This is the case before us.

Without the authority of the case of *Day vs. Everett*, 7 Mass., or that of *Nickerson vs. Howard*, 19th John. Rep., (which indeed are decisive,) we can have no difficulty in deciding this case on principle. The judgment of the circuit court must be reversed, and judgment be given here upon the verdict of the jury, that the plaintiff recover his damages, &c.

AYMETTE vs. THE STATE.

1. The act of 1837-8, ch. 137, sec. 2, which prohibits any person from wearing any bowie knife, or Arkansas tooth-pick, or other knife or weapon in form, shape or size resembling a bowie knife or Arkansas tooth-pick under his clothes, or concealed about his person, does not conflict with the 26th section of the first article of the bill of rights, securing to the free white citizens the right to keep and bear arms for their common defence.

2. The arms, the right to keep and bear which is secured by the constitution, are such as are usually employed in civilized warfare, and constitute the ordinary military equipment; the legislature have the power to prohibit the keeping or wearing weapons dangerous to the peace and safety of the citizens, and which are not usual in civilized warfare.

3. The right to keep and bear arms for the common defence, is a great political right. It respects the citizens on the one hand, and the rulers on the other; and although this right must be inviolably preserved, it does not follow that the legislature is prohibited from passing laws regulating the manner in which these arms may be employed.

At the January term, 1840, of the circuit court of Giles county, Judge Dillahunty presiding, an indictment was filed against William Aymette. This indictment charged: 1st. That Aymette on the

[Aymette vs. The State.]

26th day of June, 1839, in the county of Giles, "did wear a certain bowie knife under his clothes, and keep the same concealed about his person, contrary to the form of the statute," &c. 2d. "That on the same day, &c., the said Aymette did wear a certain other knife and weapon, in form, shape and size resembling a bowie knife, and under the clothes of him the said Aymette, and concealed about the person of him," &c.

The defendant pleaded not guilty, and the case was submitted to a jury at the October term, 1840, Judge Dillahunt presiding.

It appeared that Aymette, during the sitting of the circuit court in June, 1839, at Pulaski, Giles county, had fallen out with one Hamilton, and that about 10 o'clock, P.M. he went in search of him to a hotel, swearing he would have his heart's blood. He had a bowie knife concealed under his vest and suspended to the waistband of his breeches, which he took out occasionally and brandished in his hand. He was put out of the hotel and proceeded from place to place in search of Hamilton, and occasionally exhibited his knife.

The jury, under the charge of the court, returned a verdict of guilty.

The defendant moved the court in arrest of judgment, but the motion was overruled and the defendant sentenced to three months imprisonment in the common jail of Giles county, and to pay a fine of two hundred dollars to the State. From this judgment defendant appealed in error.

Washington and Ewing, for Aymette.

Attorney General, for the State.

GREEN, J. delivered the opinion of the court.

The plaintiff in error was convicted in the Giles circuit court, for wearing a bowie knife concealed under his clothes, under the act of 1837-8, ch. 137, sec. 2, which provides, "That if any person shall wear any bowie knife, or Arkansas tooth-pick, or other knife or weapon, that shall in form, shape or size resemble a bowie knife or Arkansas tooth-pick, under his clothes, or keep the same concealed about his person, such person shall be guilty of a misdemeanor, and upon conviction thereof, shall be fined in a sum not less than two hundred dollars, and shall be imprisoned in the county jail, not less than three months and not more than six months."

[*Aymette vs. The State.*]

It is now insisted that the above act of the legislature is unconstitutional, and therefore the judgment in this case should have been arrested.

In the first article of the Constitution of this State, containing a declaration of rights, sec. 26, it is declared, "That the free white men of this State, have a right to keep and bear arms for their common defence."

This declaration, it is insisted, gives to every man the right to arm himself in any manner he may choose, however unusual or dangerous the weapons he may employ; and thus armed, to appear wherever he may think proper, without molestation or hindrance, and that any law regulating his social conduct, by restraining the use of any weapon or regulating the manner in which it shall be carried, is beyond the legislative competency to enact, and is void.

In order to have a just and precise idea of the meaning of the clause of the constitution under consideration, it will be useful to look at the state of things in the history of our ancestors, and thus comprehend the reason of its introduction into our constitution.

By the act of 22 and 23, Car. 2d, ch. 25, sec. 3, it is provided that no person who has not lands of the yearly value of £100, other than the son and heir apparent of an esquire, or other person of higher degree, &c., shall be allowed to keep a gun, &c. By this act, persons of a certain condition in life were allowed to keep arms, while a large proportion of the people were entirely disarmed. But King James the 2d, by his own arbitrary power, and contrary to law, disarmed the Protestant population, and quartered his Catholic soldiers among the people. This, together with other abuses, produced the revolution by which he was compelled to abdicate the throne of England. William and Mary succeeded him, and in the first year of their reign, Parliament passed an act recapitulating the abuses which existed during the former reign, and declared the existence of certain rights which they insisted upon as their undoubted privileges. Among these abuses, they say, in sec. 5, that he had kept a "standing army within the kingdom in time of peace without consent of Parliament, and quartered soldiers contrary to law." Sec. 6. "By causing several good subjects, being Protestants, to be disarmed, at the same time when Papists were both armed and employed contrary to law."

In the declaration of rights that follows, sec. 7 declares, that "the subjects which are Protestants may have arms for their de-

[Aymette vs. The State.]

fence, suitable to their condition and as allowed by law." This declaration, although it asserts the right of the Protestants to have arms, does not extend the privilege beyond the terms provided in the act of Charles 2d, before referred to. "They may have arms," says the Parliament, "suitable to their condition, and as allowed by law." The law, we have seen, only allowed persons of a certain rank to have arms, and consequently this declaration of right had reference to such only. It was in reference to these facts, and to this state of the English law, that the second section of the amendments to the Constitution of the United States was incorporated into that instrument. It declares that "a well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed."

In the same view, the section under consideration of our own bill of rights was adopted.

The evil that was produced by disarming the people in the time of James the second, was, that the King, by means of a standing army, quartered among the people, was able to overawe them, and compel them to submit to the most arbitrary, cruel and illegal measures. Whereas, if the people had retained their arms, they would have been able, by a just and proper resistance to those oppressive measures, either to have caused the King to respect their rights, or surrender (as he was eventually compelled to do) the government into other hands. No private defence was contemplated or would have availed any thing. If the subjects had been armed, they could have resisted the payment of excessive fines, or the infliction of illegal and cruel punishments. When, therefore, Parliament says, that "subjects which are Protestants, may have arms for their defence, suitable to their condition as allowed by law," it does not mean for *private defence*, but being armed, they may as a body, rise up to defend their just rights, and compel their rulers to respect the laws. This declaration of right is made in reference to the fact before complained of, that the people had been disarmed, and soldiers had been quartered among them contrary to law. The complaint was against the *government*. The grievances to which they were thus forced to submit, were for the most part of a public character, and could have been redressed only by the people rising up for their *common defence* to vindicate their rights.

The section under consideration, in our bill of rights, was adopt-

[Aymette vs. The State.]

ed in reference to these historical facts, and in this point of view its language is most appropriate and expressive. Its words are, "The free white men of this State have a right to keep and bear arms for their common defence." It, to be sure, asserts the right much more broadly than the statute of first William and Mary. For the right *there* asserted, is subject to the disabilities contained in the act of Charles the second. There lords and esquires, and their sons and persons, whose yearly income from land amounted to one hundred pounds, were of suitable condition to keep arms. But, with *us*, every free white man is of suitable condition; and, therefore, every free white man may *keep and bear arms*. But to keep and bear arms for what? If the history of the subject had left in doubt the object for which the right is secured, the *words* that are employed must completely remove that doubt. It is declared that they may keep and *bear* arms for their *common defence*. The word "*common*" here used, means according to Webster; 1. Belonging equally to more than one, or to many indefinitely. 2. Belonging to the public. 3. General. 4. Universal. 5. Public. The object then, for which the right of keeping and bearing arms is secured, is the defence of the *public*. The free white men may keep arms to protect the public liberty, to keep in awe those who are in power, and to maintain the supremacy of the laws and the constitution. The words "bear arms" too, have reference to their military use, and were not employed to mean wearing them about the person as part of the dress. As the object for which the right to keep and bear arms is secured, is of general and public nature, to be exercised by the people in a body, for their *common defence*, so the *arms*, the right to keep which is secured, are such as are usually employed in civilized warfare, and that constitute the ordinary military equipment. If the citizens have these arms in their hands, they are prepared in the best possible manner to repel any encroachments upon their rights by those in authority. They need not, for such a purpose; the use of those weapons which are usually employed in private broils, and which are efficient only in the hands of the robber and the assassin. These weapons would be useless in war. They could not be employed advantageously in the common defence of the citizens. The right to keep and bear them, is not, therefore, secured by the constitution.

A thousand inventions for inflicting death may be imagined, which might come under the appellation of an "arm" in the figura-

[*Aymette vs. The State.*]

tive use of that term, and which could by no possibility be rendered effectual in war, or in the least degree aid in the common defence. Would it not be absurd to contend that a constitutional provision, securing to the citizens the means of their common defence, should be construed to extend to *such* weapons, although they manifestly would not contribute to that end, merely because, in the hands of an *assassin*, they might take away life?

The legislature, therefore, have a right to prohibit the wearing, or keeping weapons dangerous to the peace and safety of the citizens, and which are *not* usual in civilized warfare, or would not contribute to the common defence. The right to keep and bear arms for the common defence is a great political right. It respects the citizens on the one hand and the rulers on the other. And although this right must be inviolably preserved, yet, it does not follow that the legislature is prohibited altogether from passing laws regulating the manner in which these arms may be employed.

To hold that the legislature could pass no law upon this subject, by which to preserve the public peace, and protect our citizens from the terror, which a wanton and unusual exhibition of arms might produce, or their lives from being endangered by desperadoes with concealed arms, would be to pervert a great political right to the worst of purposes, and to make it a social evil, of infinitely a greater extent to society, than would result from abandoning the right itself.

Suppose it were to suit the whim of a set of ruffians to enter the theatre in the midst of the performance, with drawn swords, guns and fixed bayonets, or to enter the church in the same manner, during service, to the terror of the audience; and this were to become habitual; can it be, that it would be beyond the power of the legislature to pass laws to remedy such an evil? Surely not. If the use of arms in this way cannot be prohibited, it is in the power of fifty armed ruffians to break up the churches, and all other public assemblages, where they might lawfully come, and there would be no remedy. But we are perfectly satisfied that a remedy might be applied. The convention in securing the public political right in question, did not intend to take away from the legislature all power of regulating the social relations of the citizens upon this subject. It is true, it is somewhat difficult to draw the precise line where legislation must cease, and where the political right begins, but it is *not* difficult to state a case where the right of legisla-

[Aymette vs. The State.]

tion would exist. The citizens have the unqualified right to keep the weapon, it being of the character before described, as being intended by this provision. But the right to *bear arms* is not of that unqualified character. The citizens may bear them for the *common defence*; but it does not follow, that they may be borne by an individual, merely to terrify the people, or for purposes of private assassination. And as the manner in which they are worn, and circumstances under which they are carried, indicate to every man, the purpose of the wearer, the legislature may prohibit such manner of wearing as would never be resorted to by persons engaged in the common defence.

We are aware that the court of appeals of Kentucky, in the case of *Bliss vs. The Commonwealth*, 2 Littel's Rep. 90, has decided that an act of their legislature, similar to the one now under consideration, is unconstitutional and void. We have great respect for the court by whom that decision was made, but we cannot concur in their reasoning.

We think the view of the subject which the opinion of the court in that case takes, is far too limited for a just construction of the meaning of the clause of the constitution they had under consideration. It is not precisely in the words of our constitution, nevertheless, it is of the same general import. The words are, that "the right of the citizens to bear arms in defence of themselves, and the State, shall not be questioned."

In the former part of this opinion, we have recurred to the circumstances under which a similar provision was adopted in England, and have thence deduced the reason of its adoption, and consequently have seen the object in view, when the right to keep and bear arms was secured. All these considerations are left out of view, in the case referred to, and the court confine themselves entirely to the consideration of the distinction between a law prohibiting the right, and a law merely regulating the manner in which arms may be worn. They say, there can be no difference between a law prohibiting the wearing concealed weapons, and one prohibiting the wearing them openly.

We think there is a *manifest* distinction. In the nature of things, if they were not allowed to bear arms openly, they could not bear them in their defence of the State at all. To bear arms in defence of the State, is to employ them in war, as arms are usually employed by civilized nations. The arms, consisting of swords, mus-

[*Aymette v. The State.*]

kets, rifles, &c., must necessarily be borne openly; so that a prohibition to bear them openly, would be a denial of the right altogether. And as in their constitution, the right to bear arms in defence of themselves, is coupled with the right to bear them in defence of the State, we must understand the expressions as meaning the same thing, and as relating to public, and not private; to the common, and not the individual defence.

But a prohibition to wear a spear concealed in a cane, would in no degree circumscribe the right to bear arms in defence of the State; for this weapon could in no degree contribute to its defence, and would be worse than useless in an army. And, if, as is above suggested, the wearing arms in defence of the citizens, is taken to mean, the common defence, the same observations apply.

To make this view of the case still more clear, we may remark, that the phrase, "*bear arms*," is used in the Kentucky constitution as well as in our own, and implies, as has already been suggested, their military use. The 28th section of our bill of rights provides, "that no citizen of this State shall be compelled to *bear arms*, provided he will pay an equivalent, to be ascertained by law." Here we know that the phrase has a military sense, and no other; and we must infer that it is used in the same sense in the 26th section, which secures to the citizen the *right to bear arms*. A man in the pursuit of deer, elk and buffaloes, might carry his rifle every day, for forty years, and, yet, it would never be said of him, that he had *borne arms*, much less could it be said, that a private citizen *bears arms*, because he has a dirk or pistol concealed under his clothes, or a spear in a cane. So that, with deference, we think the argument of the court in the case referred to, even upon the question it has debated, is defective and inconclusive.

In the case of *Simpson vs. The State*, 5th Yer. Rep. 356, Judge White, in delivering the opinion of the court, makes use of the general expression, that "by this clause in the constitution, an express power is given, and secured to all the free citizens in the State to keep and bear arms for their defence, without any qualification whatever, as to their kind and nature."

But in that case, no question as to the meaning of this provision in the constitution arose, or was decided by the court, and the expression is only an incidental remark of the judge who delivered the opinion, and, therefore, is entitled to no weight.

We think, therefore, that upon either of the grounds assumed in

[Knott, et als. vs. Hicks, et als.]

this opinion, the legislature had the right to pass the law under which the plaintiff in error was convicted. Let the judgment be affirmed.

KNOTT, et als. vs. HICKS, et als.

It is necessary to a recovery by the holder of a note against an endorser to aver and prove demand and notice, and the want of such averment is not cured by verdict.

A. Dale and E. Dale, under the style of A. Dale & Co., executed and delivered their promissory note for the sum of \$1710 to L. H. Duncan, on the 19th of September, 1838, payable four months after date at the Planters' Bank. Duncan endorsed and delivered it to Jesse Rainey, Jesse Rainey endorsed and delivered it to R. F. Knott, and R. F. Knott endorsed and delivered it to Hicks, Ewing & Co. When the note fell due it was protested for non-payment, but not according to law, and no notice given.

Hicks, Ewing & Co. instituted an action of trespass on the case in the circuit court of Maury county, on the 19th of March, 1839, against the makers and endorsers of the note. At the May term, 1839, the plaintiffs filed their declaration, setting forth the note and the endorsements thereupon and the protest of the said note, but omitted to aver that the holders had given notice according to law to the endorsers of the demand and protest, or to set forth any excuse for failure so to do.

The defendants pleaded "payment," "set off," and "no assignment." At the succeeding term, the cause was submitted to a jury upon issues formed upon these pleas, and a verdict and judgment rendered for the plaintiffs for the amount of note and interest thereupon. The endorsers appealed in error.

Dew, for plaintiffs in error.

Pillow, for defendants in error.

TURLEY, J. delivered the opinion of the court.

This is an action brought by the defendants in error against the plaintiffs, as the endorsers of a promissory note drawn by A. Dale & Co. The suit is brought jointly against the makers and endors-

[Smith vs. McCall's heirs.]

ers. The making of the note, its endorsements and dishonor, are duly set forth in the declaration, but there is no averment of a notice of the dishonor having been given to the endorsers, nor any legal excuse assigned for not having done so.

This, it is admitted, is fatal, unless the defect be cured by verdict; that it is not, has been abundantly determined. See Chitty on Bills, 465, 2 Tidd's Practice, Phil'd. Ed. of 1828, page 950, and the case of *Slocum vs. Pomeroy*, 6 Cranch, 221, where the question is directly determined by the supreme court of the United States. The judgment of the circuit court, will, therefore, be reversed.

SMITH vs. McCALL'S HEIRS.

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1. A grant for land gives the grantee a constructive possession, which continues until an actual adverse possession commences, and such adverse possession must be continued seven years before the grantee loses his right of possession.

2. Where two grants covered in part the same land and actual adverse possession had been held under the younger grant more than seven years, but such possession was of a portion of the younger grant not included in the bounds of the elder grant: Held, that the statute of limitations did not protect the defendant in the possession of land included in the elder grant, which had not been actually adversely held for seven years.

McCall's heirs instituted this action of ejectment in the circuit court of Maury county, against Smith on the first day of August, 1838. The case was submitted to a jury at the January term, 1840, on the plea of not guilty, Judge Dillahunty presiding. It appeared by the documentary evidence introduced, that A. McCall deceased, the father of the plaintiffs, made two entries in the county of Maury, in the year 1811, by virtue of North Carolina military land-warrants, that these entries were surveyed in 1812, and grants were issued for the said tracts of land to the McCalls' by the State of Tennessee in 1814. Neither McCall nor any person for him, nor his representatives ever had actual possession of any part of the land above mentioned. Defendant, Smith, made propositions of purchase to McCall, but failing to purchase entered 200 acres in 1828. This entry included a considerable portion of the land embraced within the limits of McCalls' grant. Smith settled on his entry shortly after he made the same, but did not take actual possession of any part of the land embraced within the

[Smith vs. McCall's heirs.]

limits of McCalls' grant at that time. After having remained more than seven years on the place at which he settled, he took actual possession of that portion of his grant which covered a part of McCalls' grant about two years before the commencement of this suit.

The court charged the jury, that if the land in dispute was covered by the grant to the McCalls and also by the grant to Smith, and Smith had been more than seven years in actual possession of a part of the land embraced in his grant and also embraced in McCalls' grant, such actual adverse possession of seven years would by virtue of the statute of limitations protect him to the extent of the boundaries of his grant; but if he had not been in the actual possession of any part of the land embraced in the McCalls' grant and held the same adversely for seven years, that Smith could not protect himself by virtue of the statute, though the McCalls never had been in the actual possession of any part of the land embraced in his grants, because there would be constructive possession against constructive possession under the respective grant and the elder would prevail; and that to enable the younger grantee to avail himself of the statute of limitations, he must have had seven years actual adverse possession of a portion of the land embraced in the elder grants; that in that event possession of part so embraced in the elder grant would protect him to the extent of his boundaries. The jury rendered a verdict in favor of the plaintiffs. The defendant moved the court for a new trial which was overruled and judgment rendered. The defendant appealed in error.

Cahal, for plaintiff in error, controverted the correctness of the determination of the majority of the court in the case of *Talbot vs. McGavock*, 1 Yerg. 262.

Dew, for defendant in error, cited, *Slade vs. Smith*, 1 Hay. 248: *Talbot vs. McGavock*, 1 Yer. 262: *Napier vs. Simpson*, 1 Ten. 453: *Trimble vs. Smith*, 4 Bibb, 257: *Smith vs. Mitchell*, 1 Marsh. 207: *Ross vs. Cobb*, 9 Yer. 463; *McClung vs. Ross*, 5 Wheaton, 116: *Elliot vs. Peale*, 10 Peter's, 444: 10 Yer. 518.

RUSSELL, J. delivered the opinion of the court.

In the trial of this cause in the circuit court, it appeared in proof, that Harman P. Smith, had for more than seven years been in ac-

[Smith vs. McCall's heirs.]

tual possession of a portion of the land covered by his grant, but that he had not been for the period of seven years in actual possession of any part of the land which is covered by his grant, and, also, by the grant of plaintiff's lessors. The grant of McCall is older than that of Smith, but the grantee and those claiming under him, had at no time, been in actual possession of any part of it. Upon this state of the facts, the circuit court charged the jury, "that if Smith had not been in actual possession of any part of the land included in McCall's grant for seven years, though McCall had never been in actual possession of any part of his land, that Smith could not defend himself, under the statute of limitations."

The legal correctness of this charge, is here called in question, by the plaintiff in error. The precise point was presented for consideration in the case of *Talbot vs. McGavock*, 1 Yer. Rep., and upon very full and elaborate discussion, was decided against the bar of the statute under such circumstances. The late Nicholas P. Smith, Esq., an able lawyer, sat as special judge in the case, and he and Judge Catron concurred in the decision. Judge White, indeed dissented, and the very favorable estimate, which has always been justly placed upon his legal abilities, has probably induced the plaintiff to bring the question again under consideration. The principle decided in the case of *Talbot vs. McGavock*, has been adhered to ever since, a period of eleven years. But the case itself was not an innovation. Twenty years before that time, it had been determined, "that possession of land so as to produce a bar, must be an actual possession of some part in dispute; cultivation of part of the defendant's claim, not within the bounds of the disputed part, is not sufficient to authorise the bar of the statute." 1 Ten. Rep. 153. Judge Catron referring to the decision in 1 Ten. Rep., says, in the case of *Talbot vs. McGavock*, that he understood the bench and the bar, the legislature and the community, to have acquiesced, during the intermediate period of twenty years, in that decision, as being the law, and a correct construction of the act of 1797, and he intimates that it ought not to be disturbed, even if doubts of its correctness had been entertained. It is not necessary after a discussion of the question so full and elaborate, as is to be found in the case of *Talbot vs. McGavock*, to do more than refer to that case. With the grounds upon which it is there placed, we are entirely satisfied; it may safely rest upon them and they need

[Muse vs. Donelson.]

not be justified, if, indeed they could be, by any additional reasoning of ours. And further, if we doubted, as we do not, the correctness of the judgment in that case, we should still yield to its authority. A greater evil can scarcely be imagined, than a habitual fluctuation in judicial opinion, as to questions affecting the rights, and regulating the conduct of a whole community in relation to real property. If the judicial history of Tennessee shall show, that our State, has not been at all times exempt from this evil, we may be pardoned, perhaps, for indulging the belief, that the last five years cannot be pointed to as the period of its greatest prevalence. Let the judgment be affirmed.

MUSE vs. DONELSON.

1. When the statute of limitations has once run against a debt, the cause of action is extinguished.

2. No promise made by a partner after a dissolution of the partnership, will bind another member of such firm, so as to take a case out of the statute, or stop its operation where it has not.

Ransford McGregor, John McGregor and Jacob D. Donelson entered into partnership in the business of merchandizing, in the town of Jefferson, in the county of Rutherford, in the year 1829, under the firm style of R. McGregor & Co. On the 11th day of April, 1832, the partnership still continuing, they executed a note for goods purchased, in the following words:

"Six months after date, we promise to pay to the order of Johnson, Waterman & Co., sixty-three dollars thirty-eight cents, without defalcation, for value received. R. MCGREGOR & Co."

This note was delivered to Johnson, Waterman & Co., who delivered it to Muse, with the following endorsement without date, "We assign the within note to Samuel O. Muse."

The partnership expired in 1834, and John McGregor died. In 1837, the note was presented to R. McGregor, who stated that "it was correct," and that he would pay it, he being the active partner in the concern, and intrusted with the liquidation of the affairs of the concern.

On the 15th day of November, 1839, Muse, as assignee, instituted an action, by warrant, against R. McGregor and Donelson,

[*Muse vs. Donelson.*]

and against R. McGregor as executor of John McGregor, deceased, before a justice of the peace for Rutherford county. The justice rendered judgment against Jacob D. Donelson and Ransford McGregor, in his own right, (but for him as executor,) for the amount of the note and interest. J. D. Donelson alone appealed to the circuit court.

It was tried at the March term, 1840, before Thomas Maney, judge, and a jury of Rutherford county. His honor charged the jury, that no promise made by a partner after the dissolution of the firm, could bind his co-partners, whether made before or after the statute had performed its office.

They rendered a verdict for the defendant. The plaintiff moved the court for a new trial. The motion was overruled and judgment rendered in conformity with the verdict. The plaintiff appealed in error.

Ready, for plaintiff in error. The acknowledgement of a previous debt due from a firm, made by one partner, after the dissolution, binds the other partners, so as to prevent them from availing themselves of the statute of limitations. *Patterson vs. Choat*, 7 Wend. 441: *Smith vs. D. & G. Ludlow*, 6 John. Rep. 267. The acknowledgement will not of itself be evidence of an original debt, but the original debt being proved or admitted, (as it is proved in this case by the production of the note,) the confession of one will bind the others, so as to prevent them from availing themselves of the statute of limitations. *Hackley vs. Patrick*, 3 John. Rep. 536, and the case above cited from 7th Wend. See also *McIntire & Co. vs. Oliver*, surviving partner, &c., 2 Hawk. 209: 1 Gall. Rep. 635: *Wood vs. Braddick*, 1 Taunt. 104: *Shelton vs. Cook, et al.* 3 Munf. 191: *Simpson, et al. vs. Gidds*, 2 Bay. Rep. 533: 2 Wash. C. C. Rep. 388.

Keeble, for defendant in error. After a dissolution of partnership, the acknowledgement of one partner cannot take a case out of the statute of limitations, so as to bind the other partners, *Belote's ex'rs vs. Wynne and others*, 7 Yer. 534: *Bell vs. Morrison and others*, 1 Peters, 370-71-2-3: Gow on Partnership, 310.

GREEN, J. delivered the opinion of the court.

This suit was brought before a justice of the peace, the 15th of Nov. 1839, upon a promissory note executed by the firm of R.

[*Muse vs. Donelson.*]

McGregor & Co., dated 11th April, 1832. The partnership of R. McGregor & Co., was created in 1829, and expired by limitation in 1834. The justice gave judgment for the plaintiff, and the defendant Donelson, alone, appealed to the circuit court.

In the circuit court, the defendant relied on the statute of limitations, and the plaintiff proved, that in 1837, R. McGregor, who was the active member of the firm of R. McGregor & Co., acknowledged said note to be just, and promised the plaintiff to pay the same.

The court charged the jury, that "after a partnership had ceased, one partner could not make an acknowledgement of a debt, and a promise to pay the same, as detailed in the evidence, which would be obligatory on the other members of the firm, so as to exclude the statute of limitations. That if such acknowledgement and promise were made, either before or after the statute had performed its office, the effect would be the same. That such acknowledgement and promise would not prevent the statute from running in favor of the other partners, although the debt might not be barred at the time the acknowledgement and promise was made." This charge is correct in all respects. That the acknowledgement and promise of the partner, made after the dissolution of the partnership, will not take a case out of the statute of limitations, was decided by this court in the case of *Belote vs. Wynne*, 7 Yer. Rep. 341; because, say the court, "after a dissolution of a partnership, no partner can create a cause of action against the other partners, except by a new authority communicated to him for that purpose. When the statute of limitations has once run against a debt, the cause of action against the partnership is gone. The acknowledgement, if it is to operate at all, is to create a new cause of action."

The case of *Belote vs. Wynne*, is in accordance with what had been the settled doctrine of this court in regard to the statute of limitations previous to that decision. It was only the application of established principles, to the particular case of an acknowledgement by a partner after a dissolution. In the case of *Evans vs. Duberry*, 1 Marsh. Rep. 189, the court of appeals of Kentucky, decided that evidence of the acknowledgement of one partner of the existence of a debt made after the dissolution, was inadmissible against another partner. In the case of *Bell vs. Morrison*, 1 Peters' Rep. 351, 375, the supreme court of the United States decided, that the acknowledgement of one partner, after the dissolu-

[Leake vs. Cannon, et al.]

tion, would not operate to take a case out of the statute of limitations as to other partners.

The opinion of the court in this case, delivered by Judge Story, exhausts the subject, and states the principles upon which it rests, with great clearness and force. These principles and views were recognized and adopted by this court, in the case of *Belote vs. Wynne*. With that decision we are entirely satisfied, and reaffirm its principles. But in this case, the counsel for the plaintiff in error takes a distinction between an acknowledgement made after the bar of the statute had been formed, and one made before the expiration of the time to form the bar. This distinction cannot exist in principle. In *Bell vs. Morrison*, the court say, "the acknowledgement, if it operate at all, is to create a new cause of action."

But in the commencement of the same paragraph, (page 373) they say, that "after the dissolution of a partnership, no person can create a *cause* of action against the other partners, except by a new authority communicated to him for that purpose." If then, he can create no new cause of action; and if the acknowledgement, to have any efficacy, does create such cause of action, it follows, that whether it is made before or after the time limited in the statute has expired, can make no difference. *Gow on partnership*, 310. Let the judgment be affirmed.

LEAKE VS. CANNON, *et als.*

1. Where a tract of land, intended to be sold, was laid off into lots with streets intersecting each other for the benefit of purchasers, and the lots were sold; Held, that the obstruction of such streets, by one or more of the purchasers, to the injury of other purchasers, was a nuisance relievable in chancery.

2. Where such land, so divided, was sold under a decree in chancery, upon a credit of one, two and three years, and the bill still pending, and the purchasers come into possession under the sale: Held, that the property was still *sub judice*, that the purchasers were *quasi* parties, and that the court had the power, on the petition of any purchaser, to have the nuisance abated in the name of the complainants.

This is an appeal from a decree of the chancery court of Franklin, directing the abatement of a nuisance.

The executors and devisees of John McNairy, deceased, filed

[Leake vs. Cannon, et als.]

their bill in the chancery court at Franklin, in 1838, praying an execution of the trusts of the will, under the supervision of the court. The court ordered a sale of the real estate, in order to effect a more just and equitable division amongst those entitled thereto. This sale took place in accordance with the decree, and notes were taken from the purchasers for the consideration money, payable in instalments, in one, two and three years. Amongst other tracts sold, was the one on which said McNairy lived at the time of his death, adjoining the town of Nashville, containing the number of 448 acres, of great value.

The clerk and master, under whose direction the sale took place, divided this tract into lots of convenient size, and laid off public streets, intersecting each other and running through the tract. A map was made of the lots and of the streets, and this map was exhibited to purchasers on the day of sale. On the day of sale Joseph Leake, N. Cannon, John Nichol, James McCombs, and others, became purchasers of lots. Cannon, McCombs and other purchasers enclosed their lots, and obstructed one of the streets which passed by the property of Leake.

Leake filed his petition on the 28th day of October, 1840, in the chancery court at Franklin, setting forth the above facts, and stating that one of the main passways, leading from his property to the Charlotte Turnpike, having been obstructed, the value of his property had been greatly diminished thereby, and praying that N. Cannon, J. McCombs and others, purchasers, might be notified to appear before the court, to show cause why the petitioner should not be allowed his right of way as exhibited on the day of sale by the map of the premises, and why said obstructions should not be removed.

The petition was verified by the affidavit of the petitioner, and was filed during the pendency of the bill filed by the executors and devisees of McNairy, and before the notes for the purchase money under the sale were collected. On motion, (which was argued,) Bramlett, chancellor, ordered that the parties appear and show cause, &c., and that the clerk and master report the facts to the court touching the allegations in the petition.

The clerk and master reported the facts as above set forth, upon which the chancellor decreed that the defendants should remove the obstructions they had placed in the street, on or before the 1st day of January next thereafter, and that they be enjoined from

[Leake vs. Cannon, et als.]

placing any other obstruction in said street, or in any other street laid off on the map as exhibited on the day of sale; and that a special order issue to the sheriff of Davidson county, directing him to remove the obstructions after the 1st day of January next thereafter, in the event the defendants failed to comply with said order made on them.

From this decree the defendants appealed to the supreme court.

Campbell, for petitioner.

Ewing, for the defendants.

TURLEY, J. delivered the opinion of the court.

The devisees of John McNairy, filed their bill in the chancery court at Franklin, for the sale of real estate devised by the will, for the purpose of making a division. The court decreed a sale, which was made by the clerk and master under the supervision of the court. A portion of the land, adjoining the town of Nashville, was laid off into lots, with intersecting streets. The petitioner and defendants became purchasers of lots; the sale was made upon a credit of one, two and three years, which time has not expired, and the case is still in the chancery court, abiding the time for a final decree. Petitioner and defendants have taken possession of the lots purchased by them, and the defendants, in improving, have closed up some of the streets, to the injury of the petitioner, and this petition is filed, asking of the chancellor to have them opened, which he ordered. It is not denied that a chancery court has power to relieve in cases of nuisance, which the stopping of these streets is, but it is contended that this must be done by original bill, and not as is sought in this case, by petition. This is a question of practice, not of principle, and, in the absence of authorities, ought to be settled in such a manner as would give the most expeditious and cheapest remedy.

The subject matter of this dispute is already in a court of chancery; it has been sold by its order, and the parties to this proceeding, came into possession under the sale. That a court of chancery has power over this property so long as it remains *sub judice*, to protect it from waste and depredation, no one will deny, and that for this purpose, purchasers are *quasi* parties, who may be brought in by the court at any time, is equally true. But, it is said, this must be done by the original complainants and not by the co-purchaser.

[Tappan, et als. vs. Harrison, et al.]

There is but little to be gained by disputing about the mode of doing a thing, if the thing is to be done.

It can make but little difference whether the defendants are brought into court in the name of the original complainants or the petitioner, who is immediately injured by their acts. But if the proceedings have to be in the name of the parties to the bill, we have no doubt that the petition was properly filed, for otherwise the court could have no information of the wrong done, and the steps necessary to be taken to abate the enclosures of the defendants, can be in the name of the complainants and not the petitioner. We think the authorities sustain this practice. See 2 Page Rep. 316: 3 Eq. Dig. 578, pl. 9: Robertson's practice, 387: 2 Smith's Chan. practice, 213.

We, therefore, think the decision of the chancellor was correct, and affirm it.

TAPPAN, *et als.* vs. HARRISON, *et al.*

The levy of a judicial attachment upon land, creates a lien upon such land, which overreaches the lien of a judgment obtained subsequently, though the summons may have been previously issued, and previously executed.

Benjamin S. Tappan & Co. and Daniel Baugh, procured their respective writs of summons to be issued by the clerk of the circuit court of Williamson county, against Searcy D. Sharp. These writs were executed and returned to the November term, 1839.

Brown, about the same time, procured the issuance of a similar writ against Sharp, which was not executed upon Sharp, and returned "not found." On the 6th day of December, 1839, Brown issued a judicial attachment against the estate of Sharp, which on the 10th of the same month was levied by the sheriff on a tract of one hundred and forty-four acres of land, belonging to Sharp, in the county of Williamson. At the March term, 1840, (11th) Tappan & Co. recovered a judgment against Sharp for \$678 80. At the same term (27th) Baugh recovered a judgment against him for \$1450 40, and Brown at the same term (26th) recovered judgment against Sharp by default for \$690 37½.

Writs of *fi. fa.* were issued on the judgments of Baugh and

[Tappan, et als. vs. Harrison, et al.]

Tappan & Co. and a *venditioni exponas* was issued on the judgment of Brown. They were all levied by Harrison, sheriff, on the same tract of one hundred and forty-four acres. On the 20th June, 1840, the land was sold for the sum of \$3000, of which sum, Gentry, the purchaser, paid the sum of \$771 71 into the hands of the sheriff, the balance being enjoined in his hands.

The sheriff produced the writs and money in his hands in court, and asked the direction of the court in the distribution of the same. Tappan & Co. and Baugh moved the court for a judgment against the sheriff for the said amount in his hands.

The presiding judge, Maney, being of the opinion, that the lien created by the judicial attachment of James Brown, upon the land of defendant Sharp, was above and superior to the lien acquired by Tappan & Co. and by Baugh, by virtue of their respective judgments, and that the execution of Brown was first entitled to satisfaction, ordered and adjudged that sheriff Harrison pay and satisfy Brown's execution.

From this judgment, Tappan & Co. and Baugh appealed in error to the supreme court.

E. Ewing, for plaintiffs in error.

Marshall, for defendant in error, cited, acts 1777, ch. 2, sec. 23, 25: 1794, ch. 1, sec. 17, 23: 3 Murphy, 63, 67: 3 & 4 Dev. & Bat. 388: 2 Tennessee, 274: Cook, 254: 7 Peters, 464: 10 Peters, 400: 2 Bay. 277: 1 McCord, 480: 3 McCord, 169, 201; 2 Maryland, (Harris & McHenry,) 264: 1 Scott, 172: 2 Hawk. 568: 2 Murphey, 144: 1. Murphey, 266.

TURLEY, J. delivered the opinion of the court.

It appears in this case, that B. S. Tappan & Co. sued out of the circuit court of Williamson, a writ of summons against one Searcy D. Sharp, returnable to the November term, 1839, which was executed; that James Brown also sued out of the same court, a writ of summons against the same man, returnable to the same term, which was returned, *non est inventus*. At the November term, Brown procured an order of court for the issuance of a writ of judicial attachment against Sharp, which was levied upon a tract of land belonging to him. At the March term, 1840, of said court, both Tappan & Co. and Brown obtained judgments against Sharp. Upon the judgment of Tappan & Co. a writ of *fieri facias* was is-

[Ridley, et al. vs. McNairy, et als.]

sued: upon that of Brown a writ of *venditioni exponas*: the tract of land was sold, and Tappan & Co. claim a *pro rata* distribution of the fund produced by the sale. This is resisted by Brown, and the question is whether the service of the judicial attachment upon the land, created a lien thereon by which Brown acquires the right to have the fund accruing therefrom, appropriated, in the first instance, to the satisfaction of his debt. That it did, is certain. If we had, as individuals, any doubts on this subject, which we have not, it has been too well adjudicated to be now unsettled. The argument of the counsel for the plaintiff in error is ingenious, but cannot prevail against the cases in 3d Murphey, 63, 67: 3d & 4th Deveraux & Battle, 388: 7th Peters, 464: Cook, 254. Let the judgment of the circuit court be affirmed.

RIDLEY and WIFE vs. McNAIRY, et als.

1. A parol promise to give real estate, possession taken by virtue of such promise, and valuable and permanent improvements made with the consent of the owner, furnish no ground for a decree enforcing the promise.

2. Where, in a parol contract, by gift or sale, a decree for a specific performance is refused because within the act of 1801, ch. 25, an injunction will not be granted to quiet the possession of the donee or vendee. *Patton vs. McClure, M. & Y.*

3. Where the owner of real estate puts a relative in possession thereof, for the purpose of cultivating and improving the same, under the promise of a future gift, and the occupier influenced by such expectation, makes lasting and valuable improvements upon the premises with the knowledge of the owner, such occupier will be entitled to the full value of the improvements, although it may exceed the amount of the rents and profits.

4. In such case the owner cannot set up any independent claim to the rents and profits, yet if the occupier files his bill for the value of his improvements, the value of what he has enjoyed is a necessary element in the adjustment.

John McNairy, having made his last will and testament, died in the county of Davidson, leaving a very large real and personal estate. His executors, devisees and legatees on the 13th day of April, 1838, filed a bill in the chancery court at Franklin, praying that an account of the real and personal estate of the testator might be taken, and the trusts of the will executed under the supervision of the chancery court. This testament made a disposition of all the real estate belonging to the deceased, without spe-

[Ridley, et al. vs. McNairy, et als.]

ifying what lands he considered himself the owner of, or intended to devise. The bill filed for the execution of the trusts of the will was accompanied by a schedule of lands which complainants charged to belong to the deceased in his life-time, and amongst other tracts, the schedule set forth a tract of 501 acres, upon which James Ridley lived in the county of Davidson. This bill made James Ridley and his wife, Ann, parties defendant. They filed their answer to this bill and claimed the land as the absolute property of James Ridley.

On the 20th day of October, 1838, Ridley and wife filed their cross bill praying, that an account should be taken of the value of the improvements put upon the tract of land in his possession, and that complainant be allowed the value of them out of the estate of John McNairy, deceased, or that he might be quieted in the possession of said land, and that the title be divested out of the devisees of the intestate and vested in complainant Ridley. This cross bill alleges that John McNairy possessed in his life-time a large estate, real and personal; that complainant, Ridley, married Ann Hamilton, the niece of McNairy, who had no children; that for a number of years complainant was the manager and superintendant of the affairs of said McNairy; that about the year 1824, he left the employment of said McNairy, McNairy being largely indebted to him and the accounts between them being open and unsettled; that said McNairy conceived an attachment for him, put him, in 1824, in possession of the tract of land upon which he resided, and told him he intended that property for him and his wife Ann, and instructed him to put valuable and lasting improvements thereupon, such as would suit him and make the place an agreeable and permanent residence for life.

The bill further charges, that he accordingly took possession of the premises with the understanding that he was to have a conveyance of the estate to him in due time; that he, with the knowledge and approbation of the deceased, cleared upwards of 200 acres of land, erected a stone mansion-house, two stories high and fifty-eight feet long; valuable stables, hay-houses and all other out-houses convenient and necessary to the plantation, as a permanent and comfortable place of residence; that these improvements were made from time to time between the year 1825 and the death of the testator; that testator was on the premises during the progress of them, and stated on various occasions, that he intended the estate for his

[Ridley, et al. vs. McNairy, et als.]

niece; that the testator had not only consented to his undertaking these costly and valuable improvements, but was perfectly aware that the complainant was acting in good faith upon the understanding created by testator, that the property was complainants; and that complainant had resided on the place about fourteen years upon that understanding. The bill further charged, that he expressed the intention at a late period of his life to convey the title to complainant and wife, but that he became deranged and failed so to do.

In March, 1839, the executors devisees and legatees filed their separate answers. These answers denied most of the allegations of the bill and relied on the act of 1801, ch. 25, for the prevention of frauds and perjuries. The bill, however, on all its material allegations was substantiated by the testimony taken in the cause.

The cause was heard at the November term, 1840, before Chancellor Bramlett, upon the bill, answers, replications and evidence. The chancellor, though he regarded the facts alleged in the bill to have been proven, being of the opinion that complainant was not entitled to a decree for a title, nor to a decree for quiet enjoyment, nor for an injunction restraining defendants from taking possession of the land, and being further of opinion, that complainants were not entitled to a decree for the value of the improvements, dismissed the bill and ordered the costs to be paid by the estate of McNairy, deceased. From this decree the complainant appealed to the supreme court.

Meigs and Ewing, for complainants, cited, 1 Story, Eq. 375, 6, 7, 8, 9, 323: 12 Ves. 87: 5 Ves. 688: 6 John. 166: 7 Ves. 234: 1 Sch. and Lefroy, 73: 2 Story, sec. 1237: 9 Peters, 204.

James Campbell, for defendants. The case of *Patton vs. McLure*, Martin & Yerger, 331, is decisive of this case upon both points, upon the claim for improvements as well as the title to the land. If complainants could not have a decree for the land or pay for improvements when they took possession of the land and made improvements under a parol contract, *a fortiori*, can they have no such decree when they set up their claim under a parol gift. There can be no such thing as a decree for specific execution of a promise to make a gift. 1 Ves. Jr. 54: 3 Bro. Ch. Rep. 14: 1 Vern. 40: 1 Peere, W. 60: *Woodie vs. Read*, 1 Maddox, 510: 6 Ves. 544.

Mr. Campbell commented upon the case of *King's heirs vs.*

[Ridley, et al. vs. McNairy, et als.]

Thompson and wife, 9 Peters, 204, and contended that, that case could not be supported upon principle or authority, but if it could be sustained as an authority, it still did not go far enough to authorise the decree asked for by complainants.

REESE, J. delivered the opinion of the court.

Upon the first point discussed in the case before us, we are of opinion, that it results from the principles established by this court, in the case of *Patton vs. McLure*, M. & Y. Rep., that where, in a parol contract of gift, or sale, a decree for a specific performance is refused, because, within the act of 1801, ch. 25, an injunction will not be granted to protect or quiet the possession of the donee or vendee.

2. We are of opinion, that where the owner of real estate puts a relative into possession thereof, for the purpose of cultivating and improving the same, under the promise of a future gift, and the occupier, influenced by such expectation, makes lasting and valuable improvements upon the premises, with the knowledge of the owner, such occupier will be entitled to the full value of the improvements, although it may exceed the amount of the rents and profits. But although in such case, the owner could not put forth any independent claim to rents and profits, still when the occupier comes to be compensated for his improvements, the value of what he has actually enjoyed, the rents and profits, enters upon principles of natural equity as a necessary element into the compensation. The case of *King's heirs vs. Thompson and wife*, 9 Peters, 204, may perhaps be supported upon its own peculiar facts and circumstances. But we cannot regard it, as determining any general principles decisive of the case before us. We regard the contrary as a general principle as being established in 4 Littel, 364. The accidental situation and circumstances of the parties to this record, may move us to strong feelings of regret, that we cannot give the relief to complainants in their bill prayed for. But to these feelings of regret we cannot yield. Circumstances change in each case. Establish the principles contended for, and the next case might be that of a wealthy elder son, claiming for improvements to the exclusion of rents and to the ruin and to the impoverishment of minor children.

ROGERS, *adm'r.* vs. WINTON.

1. A will of slaves may be proven by one subscribing witness, where there is no contest as to its validity; and it being admitted that such will was duly proven by one witness, it will be inferred such witness was a subscribing witness, and the will would, therefore, be regarded as proven according to the forms of law.

2. Margaret Gibson obtained letters of administration, with the will annexed, upon the estate of William Gibson, deceased; she was also sole legatee: Held, by the court, that whether she held the property after two years as devisee or as administrator, was a question properly referable to the jury; and the jury having decided that she held the slaves as devisee, the statute of limitations would commence running, though the will should be afterwards set aside and letters of administration granted.

3. Where the statute of limitations operated in favor of a devisee, and the will under which such devisee claimed the property and held possession was subsequently set aside: Held, that it could not divest rights acquired by the statute.

This is an action of trover, commenced in the circuit court of Coffee county, on the 8th day of September, 1838, by Willie Rogers, administrator, *de bonis non*, of William Gibson, deceased, against Stephen Winton for the recovery of the value of slaves.

The defendant pleaded not guilty, and the statute of limitations, upon which pleas issues were formed. These issues were submitted to a jury of Coffee county, at the October term, 1840, Judge Caruthers presiding, who, under the charge of his honor, returned a verdict in favor of the defendant. The plaintiff's motion for a new trial being overruled, he appealed in error to the supreme court.

The facts of this case, and the charge of the circuit judge, are set forth in the opinion of the court.

Ready, for plaintiff in error, cited, 1 Williams on Ex'rs, 188: *Sugget vs. Mitchell*, 6 Yerger, 425: *Pinkerton vs. Walker and wife*, 3 Haywood's Rep. 221: *Thurmon vs. Shelton*, 10 Yerger, 383.

Taul and Laughlin, for defendant in error.

TURLEY, J. delivered the opinion of the court.

This is an action of trover, brought by the plaintiff to recover the whole of certain negroes in the possession of the defendant, which he claims as administrator *de bonis non* of the estate of William Gibson, deceased.

[Rogers vs. Winton.]

The following is a statement of the facts upon which the case rests. William Gibson died in the county of Maury, State of Tennessee, in the year 1816. At the November term, 1816, of the county court of Maury, administration with the will annexed, was granted upon the estate of said William Gibson to his widow Margaret Gibson. It is agreed between the parties, that negro woman Candis, the lineal ancestor of the slaves in dispute, was devised by the will, upon which letters of administration *cum testamento annexo* were granted, to the relict of William Gibson, and that the will was proven by one witness in the county court of Maury, at the time letters of administration were granted thereon.

Margaret Gibson took possession of the negro Candis, and held her and her increase, claiming them under the will until some time in 1820, when she died. Some time after the death of Margaret Gibson, the negro Candis and her increase, which she then had, to wit, Jack and Nice, came into the possession of one David Cain, who had married the sister of Margaret Gibson; he sold them to Winton, the father of defendant, about a year after he got possession of them. Winton held them and the further increase of Candis, till his death, at which period of time they were divided among his children, the two sued for, falling to the defendant, by whom they have been held ever since, and for a period of time to make his title perfect by the operation of the statute of limitations, if there be nothing to prevent its running. At the September term, 1833, of the county court of Maury, the plaintiff obtained letters of administration, *de bonis non*, upon the estate of William Gibson, deceased, and on the 8th day of September, 1836, commenced this suit. On the 19th of June, 1835, the plaintiff and others, a portion of the heirs and distributees of William Gibson, deceased, filed their petition in the county court of Maury, for leave to contest the validity of the will proven by his widow in 1816, which was so prosecuted, that at the May term, 1838, of the circuit court of Maury county, upon an issue of *devisavit vel non*, the paper writing, purporting to be the last will and testament of William Gibson, was pronounced to be not his will and testament. A copy of the record, showing this, was offered in evidence by the plaintiff and rejected by the court.

The court charged the jury, "that if Mrs. Gibson, the widow, took possession of the negroes bequeathed to her by her deceased husband, and continued that possession after the two years allowed

[Rogers vs. Winton.]

for administration of the estate, claiming them as her own property under the will, and then died, the property vested in her personal representatives, and not in the administrator *de bonis non*, and that a will proved according to the forms of law, carries the property." There was a verdict and judgment for the defendant, and an appeal to this court by the plaintiff. Two points are made:

1st. That the will was not proved according to the forms of law.

2d. That the record of the determination of the suit upon the issue of *devisavit vel non*, was improperly excluded as evidence from the jury.

Upon the 1st point it is argued, that the will was only proven by one witness, and that two are required. To this we answer, that by the act of 1789, ch. 23, sec. 1, it is provided, "That in case of a written will, the same shall be proven by at least one of the subscribing witnesses if living, but if contested, shall be proven by all the living witnesses if to be found."

This shows, that a will of personal property may be proven by one subscribing witness, except in the case of a contest as to its validity, and it being agreed that the will in this case has been duly proven by one witness, we must infer, that it was by a subscribing witness. The question was, as the judge below felt, whether Margaret Gibson, after the two years given for paying the debts of the estate, held the property as devisee under the will, or as administratrix, and properly left it to the jury, who have found it against the plaintiff. If she held it under the will, as devisee, no question can arise upon the operation of the statute of limitations in favor of the defendant, and the verdict of the jury is conclusive that she did.

The 2d question is resolved by the first; if the statute of limitations is a bar, it operated before the issue of *devisavit vel non* was found against the will, and rights acquired cannot be divested by subsequent matter. We, therefore, affirm the judgment.

CLAXTON vs. THE STATE.

1. "Judges shall not charge juries with respect to matters of fact," and if it be done against a defendant in a State case, it is a breach of his constitutional right, erroneous, and furnishes a just ground to reverse the judgment rendered against such defendant.

2. The juries are the exclusive judges of the credit due to witnesses, of the weight of testimony, and the truth of all contested statements before them.

3. What constitutes excusable homicide or manslaughter, the facts being ascertained, is a conclusion of law, and not of fact.

4. Where the court charged the jury, that if they should find a special verdict, which presented the testimony of Jones as the facts of the case, he should declare it a case of manslaughter : Held, that this charge announced a conclusion of law upon a hypothetical state of facts, and did not trench upon the constitutional rights of the defendant.

5. Where the court, in a case which involved the question as to whether the correction of a child by a parent amounted to a trespass, charged the jury, that if they believed the witnesses, "the conduct of the defendant was barbarous and cruel in the extreme:" Held, that such charge announced to the jury a conclusion of fact, and that the judge invaded the province of the jury.

John Trimble, the attorney general of the sixth solicitorial district, presented to the grand jury of the circuit court of Davidson county, at the April term, 1840, a bill of indictment against James Claxton, for the unlawful, felonious and premeditated murder of Moses Parks, on the 7th day of April, 1840, by stabbing.

The jury returned it a "true bill." The defendant pleaded not guilty, and issue was joined thereupon. At the same term the cause was submitted to a jury, upon the testimony, Judge Maney presiding. They returned a verdict, that defendant was not guilty of murder in the first degree, but guilty of manslaughter, and fixed his term of imprisonment in the jail and penitentiary house of the State, at five years. The defendant moved the court to set aside the verdict and grant him a new trial. This motion was overruled, and judgment rendered on the verdict. From this judgment defendant obtained an appeal in error to the supreme court. The facts of the case, and the charge of the judge, are very fully set forth in the opinion of the court.

Hollingsworth and Ewing, for plaintiff in error.

[Claxton vs. The State.]

Attorney General, for the State.

REESE, J. delivered the opinion of the court.

Upon the trial of this cause, in the circuit court, James Jones, a witness on behalf of the State, testified, in substance, that on the day the homicide was committed, he was at the house of one Judy Young; prisoner, in company with one Robert Harrison, came there. Shortly afterwards, Moses Parks, the deceased, came hastily into the door of the front room, looked angry and pale. At the time, the prisoner stood near a counter, leaning on it. The deceased walked up to prisoner, and said, "Jim, you would or did tear my shirt." Witness, expecting a difficulty, started to leave the room; as witness was going out, he heard something, as the tearing of a shirt; he turned round, saw the ruffle of a shirt lying on the floor. Parks said, "now we are even." Prisoner, with an oath, replied, "yes, we are," and thereupon, eyeing his shirt bosom and Parks at the same time, turned out of the door of the room, took his knife out, opened it, turned to Parks and gave him a blow with the knife on the breast, first striking on the breast with his left hand, and turning from a position, fell towards him. Witness saw nothing more, as he went out of the house. When he was outside, he heard a noise, as of a scuffling. When Claxton's ruffles were torn, he looked more hurt and afraid, than mad; he screwed himself around and opened his knife; witness saw him open it. It was not done secretly; the knife was a pocket knife with a large blade, about the length of his finger. He saw no weapon of any sort upon Parks when he came into the room, or when he approached Claxton; saw no weapon used by Parks, or attempted to be used, nor any offer to draw any weapon. Heard the cry that Parks was killed, and saw prisoner going from Judy Young's at a hasty gait; was among the first that saw Parks after he was killed; saw a large scabbard on his person, but no knife on the floor or counter. "The interval between tearing of the shirt and the killing was but a minute or so; it was almost no time at all." The testimony of Robert Harrison was much more unfavorable to the prisoner. But testimony, impeaching his general character and credit was introduced. The bill of exceptions states, that among other things, not objected to, the court charged the jury, "that a slight assault would not of itself justify a homicide, as if a man

[Claxton vs. The State.]

should slightly pull another's cravat, which would in law be an assault, and the party so assaulted, should get a bowie knife, and kill the other, this would not of itself present a case of homicide in self-defence; and further, that if the jury should return a special verdict in this case, presenting as the facts of the case, the testimony of James Jones, excluding the testimony of Robert Harrison, and taking as true, the testimony of all the other witnesses, the court could not upon such a special verdict, say the prisoner had made out a case of self-defence; that the jury had a right to return a general verdict, and the prisoner had a right to require it at their hands."

The prisoner was found guilty of manslaughter, and presents his appeal in error to this court, and his counsel contends here, that the charge of his honor, the circuit judge, is inconsistent with that provision of our constitution, which declares, "that judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law." If this assumption of the prisoner's counsel, be well founded, the judgment is, of course, erroneous. For the juries are the exclusive judges of the credit of witnesses, of the weight of the testimony and the truth of contested statements. "Judges shall not charge juries with respect to matters of fact," that is, they shall not decide upon the credit of witnesses; they shall not state in which scale there is preponderance of testimony, nor shall they inform them what conclusions of fact, from the proof heard, they ought to draw. But, "they may state the testimony, and declare the law" thereon, that is, in the case before us, the judge may say, the witness, Jones, has said so and so, or you have heard, and remember the facts stated by him, if you believe all those facts to be true, the law thereon, is that they do not make out a case of homicide, *sese defendendo*. The facts being found or admitted, what shall constitute homicide excusable, or manslaughter, is a conclusion of law, and not of fact. The case put by us, is that which really occurred. What is said by the circuit court on the subject of a special verdict, is not so strong, and so direct against the prisoner, as if he had said, that the law arising upon the statements of Jones, taking them all to be true, was that the homicide committed was not excused by the assault proved. Perhaps declarations of law, as arising upon the facts, are seldom made in the manner, or with the force presented in the case before

[Claxton vs. The State.]

us. But, be this as it may, we cannot say, that the honorable judge violated the constitutional rule, or transcended the limits of his official and appropriate duty.

We have been referred, by the prisoner's counsel, to a case determined by this court, at this place, at the December term, 1837, *Johnson and wife in error vs. The State, MS.* In that case, the question for the jury to determine was, whether the correction of a child by the defendant, so far exceeded the reasonable limits of parental duty and authority as to amount to a trespass and breach of the peace. A majority of the court, who determined that case, were of opinion, that this was a conclusion of fact, to be drawn by the jury from all the proof and circumstances of the case. But the circuit judge, in substance and effect, charged the jury, that if they believed the witnesses, "the conduct of the defendants was cruel and barbarous in the extreme," and of course that they should be found guilty. This court thought such a charge, was trenching upon the province of the jury, as to matters of fact, and reversed the judgment.

The ground upon which that decision was placed, presents no obstacle to the conclusion we have arrived at in the present case. We have likewise been referred to the cases reported in 4 Devereaux, 259, and 2 Hawks, 79. With these cases we are satisfied; they turned upon their own circumstances, and present no analogy to control the question before us. We are of opinion, therefore, that the judgment of the circuit court, in this case, must be affirmed.

COLEMAN vs. PINKARD, *et als.*

1. The father is the next of kin to his deceased children, and in case of their dying intestate and without issue, he inherits their estate.

2. Pinkard conveyed to his three children certain slaves; two of the children died intestate and without issue. Coleman obtained judgment against Pinkard, and *fi. fa.* thereon was returned, *nulla bona*. Coleman administered upon the estates of the deceased children, and filed his bill, praying a partition and subjection of the estates of the deceased children to his debt: Held, that he was entitled thereto; but the father having sold one of the slaves and appropriated the proceeds, and Coleman standing in his shoes, must account for the price of the slave sold, before he shall have partition of those remaining.

3. Coleman, a judgment creditor of Pinkard, and administrator of Oliver and Angelina Pinkard, deceased, filed his bill, claiming a distributive share of certain slaves conveyed by Pinkard to his children, Oliver and Angelina P., by deed, and the subjection of the distributive share to the payment of his debt; and also filed his bill, alledging that such deed was fraudulent and void: Held, that the claims set up in the amended bill were directly at war with those set up in the original bill, and the amended bill must be dismissed.

Marshall P. Pinkard had three children by his first wife, to wit, Mary, Angelina and Oliver; she died, and he owing no debts, and having derived some property from his deceased wife, executed the following deed:

"Know all men by these presents, that I, Marshall P. Pinkard, of Williamson county, and State of Tennessee, for and in consideration of the natural love and affection which I have and bear towards my children, Oliver Pinkard, Mary Pinkard and Angelina Pinkard, and for the further consideration of the sum of five dollars, to me in hand paid by them, have given, granted, bargained, sold and conveyed, and by these presents do give, grant, bargain, sell and deliver to them, the said Oliver, Mary and Angelina, their heirs and assigns forever, the following slaves, to wit, Hasen, aged about 22 years, Esther and her two children, Harriet and Malinda, and their increase. In testimony," &c.

This deed was acknowledged by Pinkard at the January session of the county court of Williamson, 1831, that county being at that time the residence of the parties to the deed, and it was duly registered on the 15th March, 1831. During this year he married a second time and removed to the town of Williamsport, Maury county, where he engaged in the business of merchandizing. In conversations in regard to his motives in making this conveyance of the slaves to his children, he assigned different reasons at different

[Coleman vs. Pinkard, et als.]

times, generally, however, alledging that, as he had derived property from his first wife, and was going into a hazardous business, he wished to secure it to his children, so that in the event he should become unfortunate, it should not be taken to discharge his debts. He took his three children and the slaves with him to Maury. The deed was not registered in Maury county, yet it seems to have obtained some publicity, and unfavorable motives were attributed to him in the execution of it. In May, 1834, Oliver died, and in August ensuing Angelina died, both unmarried, without issue, and intestate. In 1835, Pinkard sold Hasen for the sum of \$850, subsequently assigning as a reason for so doing, that the slave was a bad fellow, and declaring that he intended to account for the value to his daughter Mary.

In 1834, Wilson W. Coleman became responsible for Pinkard for goods purchased in Philadelphia. Pinkard's business at that time seemed profitable, and his credit was good till the year 1835, when his store house and entire stock of goods, books, &c. were consumed by fire, accidentally, which resulted in a loss to him of some twelve or fifteen thousand dollars, and produced his utter insolvency. Coleman instituted an action against him in the circuit court of Maury county, and recovered a judgment against him at the August term, 1837, for the sum of \$1602 42. A *fi. fa.* issued on this judgment and was returned, *nulla bona*, on the 1st January, 1838. Just previous to the institution of this suit, Pinkard placed his daughter and the slaves, to wit, Esther and her children, then four in number, in the hands of her uncle, Edward Pinkard, and shortly afterwards left the State.

Coleman applied to the county court of Maury county, and obtained letters of administration upon the estate of Oliver and Angelina, and on the 7th day of May, 1838, filed this bill in the chancery court at Franklin, against Marshall P. Pinkard, Mary Pinkard and Edward Pinkard, praying that two-thirds of the estate secured by the deed of the 17th day of January, 1831, to the said children, Oliver, Angelina and Mary, to wit, the interest of Oliver and Angelina, deceased, might be subjected to the payment of his debt, as the property of Marshall P. Pinkard, as inheriting the same from his deceased children. An affidavit having been made to this bill by Coleman, that he was apprehensive that the said slaves would not be forthcoming to answer the final decree in the premises, Judge Anderson, at the application of complainant, issued his order, that

[Coleman vs. Pinkard, et als.]

the sheriff take this property into his possession, and secure it to abide the decree of the court, unless the defendants, or one of them, should give bond in double the value of the slaves to complainant, that they should be forthcoming to answer the decree which should be made in the premises. Edward Pinkard gave bond in accordance with the *fiat*, and retained the slaves.

Marshall P. Pinkard answered the bill, and stated that the deed of the 17th day of January, was made in pursuance of the request of his first wife at her death; that at the time it was made he owed no debts, and that he failed through misfortune, and that when he did so fail, his daughter Mary and her property (as he supposed it all was) was sent to her uncle's, Edward Pinkard's, as a permanent home. He stated that he was insolvent, and that he had sold Hasen, and that his interest in the other slaves conveyed by said deed should be charged with the proceeds of Hasen and interest thereupon.

Edward Pinkard being appointed guardian of Mary Pinkard, filed an answer as guardian, insisting that the value of Hasen and interest thereupon should be deducted from the two-thirds of the estate which descended to Marshall on the death of Oliver and Angelina, if the court should determine that two-thirds of the value of said slaves descended to said M. P. Pinkard.

On the 1st March, 1839, Coleman filed an amended bill, charging that said slaves were conveyed by Pinkard to his children with the avowed design of commencing merchandizing, of becoming indebted, and for the purpose of preventing them from being sold for the payment of debts which he then contemplated creating, and that it was fraudulent and void; that he held possession of said slaves in Williamson county for several years, exercised acts of ownership over them, and actually sold one of them for \$850; that complainant's debt was one created for merchandize, and praying that said conveyance be declared fraudulent and void, and the property therein specified be subjected to the payment of the judgment.

The defendants answered, and denied the allegations of the amended bill.

Mary A. Pinkard filed her cross bill, praying an account of the proceeds of sale of Hasen, and of the hire of slaves, &c., as against M. P. Pinkard and complainant Coleman, which was answered by complainant Coleman, and taken as confessed against Pinkard.

[Coleman vs. Pinkard, et als.]

The cause came on to be heard at the April term, 1840, before Chancellor Bramlett, on bill, amended bill and cross bill, answers, replications and proof, and the chancellor being of the opinion that the deed of the 17th of January, 1831, was not fraudulent, dismissed the amended bill and also dismissed the cross bill of Mary Pinkard; and being further of the opinion that M. P. Pinkard was the next of kin to his deceased children, and entitled to the interest of Oliver and Angelina in the property, ordered, adjudged and decreed that two-thirds of the interest in said five slaves be vested in complainant, and that commissioners be appointed for the purpose of making such division, and that they report, &c.

The chancellor also ordered an account of the hire of said slaves since they had come to the hands of Edward Pinkard, and that Coleman pay two-thirds of the costs, and that Marshall and Edward Pinkard pay the other third.

Complainant and defendants appealed.

Alexander, for complainant.

1. As to the original bill, by which is meant the two bills filed the 7th and 8th May, 1838, complainant insists that Marshall P. Pinkard is the owner of the two-thirds of said slaves which belonged to Oliver C. and Angelina, his two deceased children, as their next of kin. 1 Wms. on Ex'rs. 253: 2 Wms. on Ex'rs. 924: *Blackborough vs. Davis*, 1 P. Wms. 49, 50, 51: Toller, 382.

2. As to the equity endeavored to be set up by the cross bill of Mary A. Pinkard, by charging the slaves with one-third of the hire of the slaves and the price of Hasen, the complainant cannot succeed for the following reasons: Mary A. Pinkard cannot recover in this suit without a judgment against her father. Act of 1832, ch. 11, C. & N. 222-3: 1 Paige R. 305, 308-9: 3 Atk. 200: *Hendrick vs. Robinson*, 2 John. C. R. 296-7: Meigs R. 256, 261. She cannot reach this specific property except through the medium of the administrator of her deceased brother and sister. 10 Yer. R. 383. Coleman having recovered his judgment first, and filed his bill first, his lien has thereby attached, and by the levy of the attachment on the property, he has acquired a priority and preference over all other creditors. *Peacock vs. Tompkins*, Meigs Rep. 317, 329. Since the act, 1784, ch. 22, (C. & N. 417,) abolishing survivorship of estates of joint tenants, and the act of 1789, ch.

[*Coleman vs. Pinkard, et als.*]

57, (C. & N. 415,) making all contracts joint and several, any principle of the old law, favoring the doctrine contended for in the cross bill, may be considered as abolished in this country:

3. As to the amended bill, complainant insists that said deed was a voluntary conveyance and void as to subsequent purchasers, the negro Hasen having been sold by the grantor in 1834. 5 Peters, 264, 279, 280-1-2. If the deed was fraudulent as to the purchaser of Hasen, the whole deed is void, and subsequent creditors are let in. 3 John. C. R. 499: *Young vs. Pate*, 5 Yer. R. 164.

This conveyance was made by M. P. Pinkard, with the intention of becoming indebted and securing the property from the creditors which he then designed to create, one of which was complainant and said deed is void as to him. 1 Story Eq. 348, 354: 2 Hov. on F. 75: *Stileman vs. Ashdown*, 2 Atk. R. 477, 481: *Iley vs. Niswenger*, 1 McCord's Ch. R. 521: *Reade vs. Livingston*, 3 John C. R. 481, 494-5-7: *Richardson vs. Smallwood*, 4 Eng. Cond. O. R. 262: Jacob R. 552: *Russel vs. Stinson*, 3 Hay. R. 11-12.

If the court shall be of opinion that actual fraud must be proved on M. P. Pinkard in making the deed of gift, then such may be shown by circumstances, some of the strongest of which appearing in this case, are as follows:

1. The deed is voluntary. It is a conveyance to children.

2. It was registered in Williamson county, from which he intended immediately to remove, and it was not registered in Maury, to which county he removed with the property.

3. Possession remained with the grantor.

4. M. P. Pinkard made this deed just as he was embarking in merchandizing.

5. He uniformly said before and after the date of the deed, that it was made to preserve the property to his children if he should be unfortunate in trade.

6. He used the property as his own, sold Hasen and used the purchase money, and never charged himself with hire.

Marshall, for defendants, cited, 1 Story Eq. 608: 6 Mad. 223.

GREEN, J. delivered the opinion of the court.

M. P. Pinkard conveyed the negroes in controversy in 1831 to his three children, Oliver, Angelina and Mary. He was then in good circumstances, and not involved in debt, but has since by

[Coleman vs. Pinkard, et al.]

misfortune become insolvent. Oliver died in May, and Angelina in August, 1834. In 1835, M. P. Pinkard sold one of the negroes, Hasen, for \$850.

The complainant is a judgment creditor of M. P. Pinkard, and has administered on the estate of Oliver and Angelina. His original bill is filed as administrator of these children, and he claims as their representative, to have partition of the negroes, and that their share (to which M. P. Pinkard is entitled as next of kin) be applied to the payment of his debt against said M. P. Pinkard.

The second amended bill is filed in the original character of the complainant, as creditor of M. P. Pinkard, and alledges that the deed of gift, of the negroes, to the children, is fraudulent and void; and that all the negroes belong to M. P. Pinkard, and are liable for the payment of his debts.

1. The first question is, whether this amended bill can be coupled with, and made part of the original, so as to entitle the complainant to a decree upon it. In other words, the question is, whether the administrator of the children, claiming under the deed, and deriving his title from the deed, can join in the same bill, a creditor of the donor, who seeks to avoid the deed, and whose right to a recovery depends upon his showing that it is fraudulent. The two claims are directly antagonistical to each other.

Although both parties claim the same property, they claim it in entirely distinct rights; and the one can only succeed by defeating the other. That the same individual is both creditor and administrator, can make no difference. The question would be the same, if they were distinct individuals.

In the original bill, the creditor and administrator are properly joined; for *there* the administrator seeks the property to distribute to the next of kin, and the creditor asks that the debt due from the next of kin (who is insolvent) shall be satisfied out of this property, before it is distributed to him by the administrator.. The claims in that bill, of the parties, are consistent with each other, and the decree in favor of the creditor must depend upon the success of the administrator. But in the amended bill it is far otherwise: The rights of the plaintiff and defendant, are not more repugnant: they cannot, therefore, be properly joined in the same bill. But we are satisfied that there is no fraud proved in this case, and, therefore, upon both grounds, the complainant's amended bill was properly dismissed.

[Coleman vs. Pinkard, et als.]

2. The next question is, whether Mary Pinkard has a right to insist that the complainant shall account for the negro Hasen, which her father sold, before he shall be entitled to partition of the remaining negroes. Unquestionably the complainant, who as creditor, seeks to have the share of M. P. Pinkard subjected to the payment of his debt, is entitled to claim no larger share of the property for that purpose, than M. P. Pinkard could obtain, were he seeking to have partition of this property. The only ground upon which the complainant can get a decree, is, that M. P. Pinkard is entitled as distributee of his deceased children to this property: and being insolvent, the aid of a court of equity is invoked, to subject his equitable interest in these estates to the payment of the complainant's debt.

What then could M. P. Pinkard obtain, were he seeking partition of these negroes? Certainly not two-thirds of those that remain, without accounting for the price of the one he sold. Instead of doing equity, when he comes asking equity, this method of division would reward him for wrong done by him in selling the negro before a partition was made.

Where a party has laid out large sums in improvements on the estate, a court of equity will not grant partition, without first directing an account, and compelling the party applying for partition to make compensation. 1 Story Eq. 608, 609: 8 Price, 518.

Nor will a court of equity grant partition without making a party who has received more than his share of rents and profits, account for them. 6 Mad. 223. These principles apply to this case, and fully justify the court in requiring M. P. Pinkard, (or in this case the complainant,) to account for the price of the negro that was sold, before he shall have partition of those remaining.

Reverse the decree, and reform it according to the principles above stated.

VAN WYCK vs. NORVELL and THE UNION BANK.

1. If negotiable paper is transferred for a valuable consideration and without notice of any fraud, the right of the holder shall prevail against the true owner; and this to favor the circulation of commercial paper.

2. This rule does not, however, prevail, where the holder has parted with no value nor incurred any new responsibility on the faith of such paper: and therefore where the holder receives a note or bill in payment of, or as security for a pre-existing debt, he is not entitled to the proceeds thereof against the true owner, though he may have received it without notice of the claim of the true owner.

3. It is a general rule in chancery, that where an allegation is made in a bill and directly denied by the answer, such allegation must be proved by two witnesses or by one witness and corroborating circumstances.

4. The answer of a corporation is not on oath, but by its corporate seal. The answer of a corporation does no more than create an issue in pleading, and therefore the allegation in a bill against a corporation, which is denied in the answer, may be overturned by one witness. The fact, that such answer is sworn to by the cashier, cannot alter the rule, the cashier being no party to the proceeding.

5. Van Wyck drew a draft upon Tilford in favor of Norvell, which was accepted by Tilford; Norvell gave Van Wyck an order on Tilford for the draft, in consideration of certain notes put in the hands of Norvell, which were to be the property of Norvell, if the order procured the draft. The draft was not returned, but without authority was transferred to Gill, Campbell & Co., as collateral security for a debt of Tilford, was protested for non-payment, and paid by Van Wyck: Held, that Van Wyck, having paid the draft to the holders and apparent owners, without notice of their defect of title thereto, was entitled to the notes.

This bill was filed in the chancery court at Franklin, on the 20th of September, 1838, by A. Van Wyck against C. C. Norvell and the President and Directors of the Union Bank, for an account of the proceeds of certain notes placed in their hands by C. C. Norvell, which, the bill alleged, belonged to complainant and were placed in Bank for collection.

The cause came on for final hearing on the bill and the answer of the Bank over its corporate seal, and which was sworn to by Somerville, cashier, a *pro confesso* judgment against Norvell, the replication of plaintiff, and proof, at the November term, 1840, before Chancellor Bramlett. He dismissed the bill as to the Union Bank, but gave a decree in favor of complainant against defendant, Norvell. All the conclusions of fact from a voluminous mass of testimony taken in the case, upon the points decided, are fully stated in the opinion of the court, which follows. Complainant appealed.

Fogg, for Van Wyck.

[Van Wyck vs. Norvell, et al.]

Washington, for the Bank.

GREEN, J. delivered the opinion of the court.

On the 3d day of March, 1837, the complainant drew a bill of exchange on John W. Tilford of Philadelphia, payable to Caleb C. Norvell, for \$3200, due four months after date, for which Norvell paid him the money. Some time after this bill was drawn, Van Wyck placed in the hands of Norvell two notes; one drawn by Stephen B. Jones, at four months from the 6th of February, 1837, for \$2500, and the other drawn by Gordon & Berry at four months, from the 20th of January, 1837, for \$844. These notes, Norvell proves, were placed in his hands without solicitation on his part, (as he required no collateral security for the payment of the draft he had purchased,) to be collected when due, and in the event Van Wyck should be absent, (which he spoke of as probable,) the proceeds were to be remitted to Philadelphia to pay said draft. On the 12th or 13th of April, Van Wyck and Norvell met at the Union Bank; news of Tilford's failure had just arrived, and Van Wyck proposed to Norvell, to exchange the notes for Norvell's order on Tilford for the said draft. To this arrangement Norvell assented, as he owed the Bank and could use the notes, if the Bank considered them good. He went to his office and got the notes, and laid them before the president and cashier of the Bank for discount. The Bank was willing to discount the notes, and credit Norvell's account by the proceeds; but after dinner, as Norvell was about to enter the cashier's room to learn the answer to his proposition, he met Van Wyck, who told him he could not permit him to have the notes unconditionally; that possibly, his draft on Tilford might be negotiated, and would not be returned on his order, and that the notes were to be held by Norvell subject to Van Wyck's claim, in case Norvell's order should not have the effect of restoring his draft.

In consequence of the annexation of this condition by Van Wyck, the cashier caused Norvell to execute his own note, without endorsement, and entered the notes placed in Norvell's hands by Van Wyck to the debit of "suspense account," and also upon the collection-book of the Bank. Norvell's order on Tilford was drawn after dinner, and after Van Wyck had annexed the condition to Norvell's use of the notes. The order was placed in the hands of the assistant cashier of the Bank and by him forwarded

[Van Wyck vs. Norvell, et al.]

to Philadelphia, but was returned, Tilford failing to give up the draft, which has since been paid by Van Wyck. The notes have been collected by the bank, and the proceeds credited to Norvell's debt, which he owed the bank before the transactions in reference to them occurred. This bill is brought for the proceeds of these notes, and the question is, under the circumstances, whether Van Wyck or the Bank has the better title to them. It is not denied, but that the notes in controversy up to the 12th of April, 1837, the time the foregoing transactions occurred, were the property of Van Wyck, nor is it questioned but that Norvell's debt, to which the proceeds of these notes have been applied, existed before that time, and that no new consideration was advanced or paid to him, at the time the notes were delivered to the Bank. The only question of fact, upon this part of the case, is, whether Van Wyck did not part with his title to the notes unconditionally, and beyond his power of recall, at the first interview with Norvell, and whether the Bank did acquire an absolute title to the notes, before the second interview, at which Van Wyck annexed the condition to Norvell's use of them. Norvell proves, that his order, in consideration of which he was to have the notes, was not executed until the second interview, and after the condition had been attached to his use of the notes, and that, although the directors were willing to discount the notes, yet they were not in fact discounted, but his own note taken and discounted, and the notes in question were deposited, as collateral security. From all the facts proved, it appeared, that after the first conversation between Van Wyck and Norvell, until they met again, in the afternoon in Bank, no definite agreement had been made, either between Van Wyck and Norvell, or between Norvell and the Bank. Van Wyck had proposed to give the notes for an order on Tilford for his draft; Norvell assented to the proposition, but did not execute the order, nor consider the notes beyond Van Wyck's control. True, he thought there would be no doubt of his ownership of the notes, and anxious to settle his debt in Bank, he hastened to get the notes, and submit them for discount in payment of the amount he owed. The Bank did not act upon the proposition. The directors were willing to discount the notes; but it was not done; no entries were made in the books until after Van Wyck had annexed the condition, and then entries were made consistent with Van Wyck's claim and ownership of the notes. It is, therefore, clear, that

[Van Wyck *vs.* Norvell, et al.]

Van Wyck did not part, absolutely, with his right to the notes, and that the case rests upon his definite contract with Norvell, that he was to be entitled to them, should the draft be returned by Tilford in obedience to his order. The question upon this state of facts, is, whether, although the Bank might have had no notice of the condition in the contract between Norvell and Van Wyck, it acquired a title to the notes?

It is settled as a general rule, that a holder coming fairly by a bill or note, has nothing to do with the transaction between the original parties, and if negotiable paper is transferred for a valuable consideration, and without notice of any fraud, the right of the holder shall prevail against the true owner. This principle, is an exception to the general rule of law, which is, that the true owner is entitled to his property, wheresoever he may find it. But with a view to favor the credit and circulation of commercial paper, it has been deemed consistent with sound policy to adopt, in relation to such paper, this exception as a rule. Because it seems reasonable, that the innocent holder having incurred loss by giving credit to the paper, and having paid a fair equivalent, is entitled to protection. But when the paper has been received in payment of, or as security for a pre-existing debt, no such reason exists. Such debt may be a good consideration as between the holder and the individual from whom he received the paper, but it can be no reason why he should hold it against the true owner. If he had parted with no value, nor incurred any new responsibility on the credit of the paper he received, his situation is rendered no worse by surrendering it to the true owner, than if he had not received it. It is not, therefore, the case, where two persons have equal equities, as is the case, where the holder makes the advance on the credit of the paper. In the case of *Kimbro vs. Lytle*, 10 Yer. 417, this court refers to, and approves the case of *Bay vs. Coddington*, 20 John. Rep. 637, in which it is held, that a holder who receives a note or bill in payment of or security for an antecedent debt, is not entitled to it, against the true owner. That case is, in principle, precisely like the one now before the court. There, Randolph and Savage had taken the notes from the purchasers of a vessel belonging to Bay, payable to themselves. These notes were delivered to Coddington in discharge of pre-existing liabilities, they had incurred for Randolph and Savage, who had become insolvent. Bay filed his bill for the notes as his property.

[Van Wyck vs. Norvell, et al.]

The court decreed that he was entitled to them, and ordered an account. The objection, therefore, made by the counsel for the Bank cannot prevail, namely, that as the parties to these notes, are not seeking to set up any equity against them, the principle of these cases does not apply. In the case of *Bay vs. Coddington*, the complainant was no party to the notes; they had been taken by his agents, from the purchaser of his vessel for the price agreed to be given. They were his property; he had an equitable right to them, against which, the holder could not set up an equal equity, because he had not received them in the due course of trade, for value advanced at the time. So here, it is not denied but that these notes belonged to Van Wyck. They were received by the bank as collateral security for a precedent debt. If the Bank is permitted to retain the proceeds, it will be gainer by so much, and Van Wyck will sustain a clear loss of that amount. If Van Wyck obtain the proceeds, he gets but his own, and the Bank is no loser. Its claim upon Norvell is in *statu quo*; having advanced to him no new consideration, on the reception of these notes, it will be in no worse situation, than if they had not been received. It is insisted, however, that the facts herein before stated, are proved only by one witness; and that as the answer contains a direct denial of them, there should be two witnesses, or corroborating circumstances, in addition to Norvell's testimony. This rule, has no application to a case like the present. The defendant here is a corporation. It answers by its corporate seal. It cannot swear to the answer, so as to oppose the oath of the defendant, to the oath of one witness, and thereby create the reason for two witnesses. Its answer does no more, therefore, than to create an issue in pleading between the parties. 6 Paige's Rep. 54. But it is said, the cashier of the Bank has sworn to the answer. It may be replied, the cashier is no party to this suit. He is an entire stranger to the proceeding; as much so, as he would be to a suit between two of his neighbors, the facts in relation to which he might happen to know. His affidavit in such a case, would have just as much efficacy as it can have in this case.

But, if other testimony were necessary, it is not wanting. James Woods, a director of the Bank, states, that the notes in question, were laid before a portion of the directors, of whom he was one, by Norvell, for discount; and that they were willing to discount them, but that after the directors had dispersed, himself re-

[Van Wyck vs. Norvell, et al.]

remaining in the room, Van Wyck entered it, and made some remarks about a claim he had on them, but said, he had a negotiation on foot, by which, he had little doubt, the notes would become Norvell's property absolutely. This of itself is evidence, that the notes had not then been transferred by Van Wyck to Norvell absolutely, and the time, at which Mr. Woods states this transaction to have occurred in the directors' room of the Bank, corroborates Norvell's account of the second interview with Van Wyck, when at the Bank they met after dinner and Van Wyck attached the condition, that the notes were to become Norvell's property, only in the event that his order should produce the return to Van Wyck of his draft.

It is true, Mr. Woods says, that the manner in which Van Wyck spoke of his claim to the notes, made it appear a small matter. It appeared a small matter, because of the confidence that Van Wyck and Norvell and the officers of the Bank entertained that Norvell's order would produce the return of Van Wyck's draft, upon which event the notes were to be Norvell's, absolutely; and it is, doubtless owing to the fact, that this strong confidence in the effect of the order, making Van Wyck's claim to the notes appear a small matter, that the existence of that claim has escaped Mr. Sommerville's memory; still, we cannot fail to perceive, that the entries made by him in the books of the Bank, were the natural effect of that claim, and were produced by it. If no such claim had existed, the notes would have been negotiated, they having been offered, and the directors having passed them for that purpose, as it would have greatly simplified the transaction. As Norvell's own note and not the notes in dispute were negotiated, and these were taken as collateral security, and were entered on the collection book and to the debit of "*suspense account*," we must infer, (in view of the evidence of Mr. Woods,) that such a change of the entries, from what they would have been had nothing interposed to prevent their negotiation, was made in consequence of Van Wyck's claim. We do not refer to these facts, as necessary to a decision of the cause. For in this case, as there is no oath of the defendant to oppose the oath of one witness, the evidence of one creditable witness is sufficient to prove the facts alleged in the bill; and, as the notes were not taken by the Bank from Norvell in the due course of trade for value advanced at the time, but as collateral security for an antecedent debt, whether the Bank had notice of Van

[Jameson's Legatees vs. Shelby, et al.]

Wyck's claim or not, it has no equity to the notes as against the true owner. The counsel for the Bank insists that Van Wyck was not legally bound to pay the draft, and therefore, Norvell's right to the notes was absolute. It is true, it now appears that Gill & Co. has no title to the draft. But they were the holders, and apparent owners at the time it was presented by their agent for payment; Van Wyck had no means of knowing, and did not know, that it had not been transferred to them, in the due course of trade for value. There were no grounds, therefore, legal or equitable, known to him, upon which he could have resisted the payment. Upon the whole, we think he is entitled to the proceeds of the notes in controversy, and therefore order an account. Let the decree be reversed, and a decree for complainant entered.

JAMESON'S LEGATEES vs. SHELBY, EX'R. *et al.*

1. Shelby, executor, transferred and appropriated to his own purposes, thirty shares of Bank stock, belonging to the legatees of Jameson, deceased: Held, in a bill filed against him for an account thereof by the legatees, that he was liable for the whole of the stock at the time of the transfer, and interest thereupon from that time till the decree.

2. Where the answer of the defendant sets forth and shows a state of facts which entitles the complainant to a decree, the complainant is entitled to such a decree, though the bill may not by its allegations make out such a case.

3. Where, however, the bill prayed only a decree for an account of thirty shares of Bank stock, and the answer of the executor alleged, that he, as executor, was indebted, on settlement with commissioners appointed by the county court, to the legatees, \$756; that he had executed his note therefor and had subsequently paid said note: Held, that this state of the pleadings did not authorise a decree against the defendant for such sum, the answer not making on the face thereof a case proper for a decree.

This bill was filed in the chancery court at Franklin, on the 4th day of April, 1834, by Eleanor Jameson, against John Shelby executor of the last will and testament of her deceased husband, William C. Jameson, and against D. S. Jameson, praying a decree for an account of thirty shares of stock in the Bank of Nashville, belonging to the legatees of the estate of said Jameson and converted by said Shelby.

It appears that in 1821, William C. Jameson, a citizen of Mont-

[Jameson's Legatees vs. Shelby, et al.]

gomery county, made his last will and testament and died. This will appointed John Shelby and others, executors. No one, however, qualified as executor except Shelby. It directed, (after disposing of a portion of his estate, in which was not included Bank stock,) that the rest and residue of his estate, real and personal, should go to his wife "for the support of herself and children during her natural life or widowhood." The testator was possessed of thirty shares of stock in the Nashville Bank amounting to \$1500 in nominal value. On the 7th day of January, 1824, Shelby, as executor, transferred to himself individually the stock on the books of the Bank and subsequently converted it to his own private purposes, at a loss of twenty-five per cent. The bill charges, that this transfer and appropriation was made without the consent or knowledge of the complainant. The answer of Shelby denies this allegation, and charges that it was done with her approbation. T. Claiborne, a witness, states, that he advised Shelby to transfer the stock to himself, as it would secure to the representatives of Jameson, deceased, the full value of the stock and avoid the loss consequent upon possible depreciation. The stock at the time of the transfer was about at par. In April, 1824, Shelby went to the county of Montgomery, where the will was recorded and letters granted to him, and there tendered a resignation of his executorship of the estate to the county court. This was received by that body and David S. Jameson appointed in his stead. The bill charges, that this proceeding was irregular, void and done without the consent or knowledge of complainant. The answer expressly declares that it was done in accordance with the expressed wishes of complainant. Commissioners were thereupon appointed by the county court to make a settlement with Shelby, who, upon investigation, ascertained Shelby to be in debt to the estate the sum of \$756, exclusive of his indebtedness on the account of Bank stock converted. Shelby thereupon executed his note to D. S. Jameson, as administrator with the will annexed, for the amount returned against him, and delivered the same to said Jameson which was received by him. At the same time, Shelby executed a bond in the penalty of \$3000, to transfer to the heirs of W. C. Jameson, deceased, fifteen hundred dollars of the stock of the bank, on the 24th day of April, 1826, and in the interval to pay the dividends which might be declared from time to time on said amount of stock.

David S. Jameson received this bond in discharge of the claim

[Jameson's Legatees vs. Shelby, et al.]

of the estate against Shelby on the stock-account. Shelby payed the dividends, but did not transfer the stock. The stock in the mean time had greatly depreciated. The bill was filed not for an account of the entire estate, but was confined to the single item of stock which had been converted by Shelby and not accounted for. The answer set forth the bond executed for the transfer of stock in 1826, and contended that the defendant was chargeable with the value of the stock at the period he obligated himself to transfer and not at the time of the transfer to himself. The answer also set forth the settlement with the commissioners in Montgomery county, the execution of the note for \$756 to D. S. Jameson as administrator with the will annexed, and insisted that he had paid the note with the exception of \$55, which it alleged, he still owed and was willing to pay.

In the progress of the suit, Eleanor Jameson died, having first made her last will and testament, bequeathing her estate to her children by her deceased husband. The suit was revived in their name. It came on to be heard on the bill, answer, replication, exhibits and proof, at the April term, 1839, of the chancery court at Franklin, Bramlett, presiding.

The chancellor decreed to complainants the value of the stock at the time when Shelby obligated himself to transfer it, to wit, in 1826, with interest thereupon from that date. He also decreed, that Shelby account to them for the sum paid to D. S. Jameson, with interest, and gave Shelby a decree for an account against Jameson. From this decree the defendant appealed to the supreme court.

Washington, for complainants.

Meigs, for Shelby.

REESE, J. delivered the opinion of the court.

I. In discussing the decree of the chancellor in this case, the complainants insisted, that the value of the Nashville Bank stock, the only subject in the bill, should, in taking the account between the parties, have been estimated as it existed in the year 1824, when the executor transferred the stock, then standing upon the books of the bank, in the name of the executor, to himself individually; and that interest from that time should have been computed

[Jameson's Legatees vs. Shelby, et al.]

upon such ascertained value. The objection to the decree, we think, is well taken. For although there is no reason to question the fairness of the motives under which the defendant, in the transfer acted, still the transfer having been made to himself, and the stock having subsequently been used by him for his individual purposes it must be held to have been an appropriation and conversion of the stock from the time of the transfer.

2. On the part of the defendant it is insisted, that the decree is erroneous in holding him liable to account for the \$756, mentioned in the answer as the balance due from him on settlement with the commissioners of the county court of Montgomery county, and for which he then alledged he gave his note to complainant in the original bill, because no claim for it is set up in the bill, nor any charge on the subject made or even any interrogatory propounded, and because, therefore, not put in issue. And to maintain this ground we are referred to Story's Eq. Pl. 36, and 88, and Gr's Ev. 22, 23, 1 Ves. 338, 339.

This court, in the case of *Rose vs. Mynatt*, 7 Yerg. Rep., held that when a case is made out in the the answer differing in the grounds and principles of equitable relief from that set forth in the bill, still, if the answer shows a proper cause for relief, the court will decree it. But that case materially differs from this, for here the answer upon this point does not make out any case for relief. It contains the matter of charge, indeed, but it also contains the matter of discharge; the defendant says he paid the \$756 to the son and agent of the complainant, with her authority and sanction. Here, then, is no case made out in the answer, upon which, of itself, the court would be warranted in grounding a decree. And if the complainants had wished to avail themselves of the matter of charge contained in the answer, and to disprove the matter of discharge also contained therein, it would have been necessary to have amended the bill, and by proper allegations to have put the matter in issue. For the bill does not seek for an account of the administration, but goes for the thirty shares of Bank stock only. The fifty-five dollars, however, admitted in the answer and which the defendant acknowledges he still owes, stands upon a different ground, and falls within the principle of the case of *Rose vs. Mynatt*, above referred to. The decree will, therefore, be reformed in conformity with these views.

GUTHRIE and WIFE vs. OWEN.

1 A writing offered for probate as a last will and testament may be established though it be not executed, and in some instances, though it be imperfect; but such want of execution and such imperfection must not result from an abandonment or change of purpose, but from the act of God which defeats the completion of it.

2. The presumption of law is against the testamentary validity of every paper offered for probate, which is unexecuted or imperfect.

3. A paper writing offered for probate as testamentary, may be set up as a will of personal estate and rejected as a will of real estate.

4. Where the will is imperfect, it must appear from the face thereof, that the establishment of it as far as it goes, is *so far* the entire will of the deceased, and that *so far* it does not thwart or defeat the wishes of the deceased, but carries them into effect.

At the November term, 1838, of the county court of Williamson county, James C. Owen produced an instrument of writing in open court, and offered it for probate, as the last will and testament of Samuel Owen, who died some short time previous thereto, in the county of Williamson, in which he resided at the time of his death. This will nominated J. C. Owen, who was the brother of the deceased, as executor. Duddy Guthrie and his wife Delila Guthrie (who was a niece of the deceased) appeared at the same time and contested the validity of the alledged will, and tendered an issue of *devisavit vel non*, and gave the security required by law, for the prosecution of the suit. 1836, ch. 18, sec. 2. The county court thereupon, ordered the cause to be certified to the circuit court, for the purpose of making up the issue, as required by the act of 1836, ch. 5, sec. 9.

At the November term of the circuit court, 1838, an entry was made on record, as follows:

“Whereas, on the 5th day of November, 1838, James C. Owen offered for probate, in the county court of Williamson, a paper writing, purporting to be the last will and testament of Samuel Owen, deceased, and D. Guthrie and wife appeared there in said court, and contested the validity of said will, which fact, together with said original paper writing, has been certified by the clerk of the county court into the circuit court. And, thereupon, the said James C. Owen, now here, offers said paper writing for probate, and avers that it is the last will and testament of Samuel Owen, deceased, and that he is ready to verify the same. And the said

[Guthrie, et al. vs. Owen.]

Dudley Guthrie and wife Delila, come and defend the wrong and injury, and aver that said paper in writing is not the last will and testament of Samuel Owen, deceased, and pray that this may be enquired of by the country, and the plaintiff doth the like."

This cause was submitted to a jury of Williamson county, at the March term, 1840, Samuel Anderson, judge, presiding.

It appeared that Samuel Owen resided in the county of Williamson, and in the full possession of his mental faculties at his death. He had no children, and was possessed of personal estate of the value of \$3000, exclusive of some debts due him; lands in Davidson county, of the value of \$1500 or \$1600, besides some others of unknown value. The nearest of kin to the deceased, are James C. Owen, his brother, Narcissa Owen, the daughter of a deceased brother, Mrs. Guthrie, a sister, and three nephews by the name of Beasly, who were the children of Mrs. Guthrie by a former husband. It appeared that Owen was displeased with the marriage of his sister to Guthrie, and therefore expressed an unwillingness that she should have any portion of his estate. At the time of his death, and for some time previous thereto, he resided at the house of his brother, James C. Owen. Being impressed with the belief that he was about to die, he sent for Ferdinand Moore for the purpose of having his will prepared. Moore arrived at the house of James C. Owen late in the evening, and commenced writing the will at nine of the clock, under the direction of the deceased, and prosecuted it till the hour of eleven o'clock. The deceased could not write, having lost the use of his hands from palsy, and could not speak, having lost, also, the use of his tongue some two years before his death: he, therefore, through the means of a dictionary communicated his ideas to the draughtsman of the will, which were written down, read to the deceased, sentence by sentence, and to which the deceased signified his assent by nodding. At eleven he became tired and sick, and desired that Moore should cease to write until the next day. The will is as follows, so far as assented to:

"I, Samuel Owen, do make and publish this my last will and testament, hereby revoking and making void all other wills by me at any time made. First. I direct that my just debts be paid, as soon after my death as possible, out of any monies I may die possessed of, or may come into the hands of my executor. Secondly. I give and bequeath to my brother James C. Owen, my boy Stephen, my carriage, my gold watch, my young gray horse by Sir

[Guthrie, et al. vs. Owen.]

William, also one thousand dollars of Turnpike stock, to wit, twenty shares in the Harpeth Turnpike. Thirdly. I give and bequeath to my niece Narcissa Robert Owen my bed, my sorrel filly by Pacific, also one thousand dollars of Turnpike stock, to wit, twenty shares in the Harpeth Turnpike. It is also my will, that James C. Owen hold the above named items as agent for the above named Narcissa R. Owen, and use it as agent for her benefit, and in the event of her decease, without issue, it is my will that the said James C. Owen shall have said property. Fourthly. I give to my brother James C. Owen, for the benefit of my three nephews, Burnett H. Beasley, Charles C. Beasley and Felix O. Beasley, and I hereby constitute and appoint him agent, to hold, to use and disburse for their (the said Beasleys) benefit, the following items, to wit, one thousand dollars in Turnpike stock, to wit, twenty shares in the Harpeth Turnpike. Fifthly. I will and bequeath my executor sell my land, lying on Mill creek, also my negro man Tom, also my land in Warren and Cannon counties, to wit, my interest in these lands. I will to be sold also, all other property, of whatsoever description, of which I may die possessed of, and the proceeds of which, together with the monies in my possession at the time of my decease, also the money due to me by bonds or accounts, when collected, to be appropriated as above bequeathed, if any surplus should remain in the hands of my executor. My desire is, that Tom should select himself a home, and be sold privately for a moderate price. Sixthly. I leave in the hands of my executor, of the money due me and to be raised as above directed, one hundred dollars for erecting tombs, and fifty dollars for fencing graveyard." (I do hereby nominate and appoint James C. Owen my executor. In testimony whereof, I do, to this my last will, set my hand and seal, this 20th October, 1838. Signed, sealed and published in our presence, and we have subscribed our names hereto, this 20th day of October, 1838. Ferdinand Moore. Everett Owen.)

He signified his desire that James C. Owen should be executor, and having manifested his satisfaction at the provisions of the will, to Moore, and also to E. Owen, they retired. Decedent had no Turnpike stock.

Moore and Owen left the place and did not return till about sundown on the next evening. On their return, they found him too much debilitated in body and mind to make any further addition to the will. Moore then retired to an adjoining room and added to

[Guthrie, et ux. v. Owen.]

it a clause, appointing James C. Owen executor, in conformity with the expressed desire of testator, and also added the attestation clause. The testator was insensible at the time of the addition of the two last clauses, and died shortly afterwards. Moore and E. Owen then signed the will as subscribing witnesses. These are the leading facts exhibited to the jury. The court charged the jury, among other things not excepted to, as follows: It is objected to this will, that it had not been finished by the testator, nor signed. The law as to that was, when a man commences a will, and does not finish it, or if the will is complete in every other respect, but is not signed by the testator, the legal intendment or presumption is, he had abandoned the will, and therefore the paper in this unfinished state, was not his will; but this presumption, like all other legal presumptions, might be repelled and rebutted by proof. The presumption would be repelled by proving the testator had suddenly died before he had time to complete the will: or it would be repelled by proof, showing the testator could not write himself, but had to rely upon another to write for him and to sign his name, and the person he had thus engaged to write his will stopped before it was finished to go off to attend to some business of his own, with the understanding he was to return in a reasonable time to complete the will, inasmuch as the testator could not control the writer of the will. But in such cases, the jury should be satisfied that the will, as far as it had been finished, was the final fixed purpose and resolution of the testator. If the proof showed the finishing of the will had been put off for the testator to reflect and deliberate upon, that view pre-supposes he had not come to a final resolution, and it would not, therefore, be his will.

The court further charged, there were some cases where an unfinished will could not be set up as far as the testator had went, and there were cases where it might be set up as far as he had went as to personal property; and the only principle the court could assume as furnishing a test when a will could be set up in part, and when it could not as regards personal property, was this: If a testator gives one or more legacies by his will, and is prevented from completing said will by death, sudden sickness or insanity, if it appeared from the evidence, the testator had expressed his full purpose and intent with regard to the legacies given, the will might be set up as far as it went; but if it appeared, either from the face of the will or other proof, he had not expressed his full mind and in-

[Guthrie, et ux. vs. Owen.]

tent with regard to the legacies given, in that case the will could not be set up as far as it went. In applying this principle to the will in question, the jury would look to the legacies given in this will, to James C. Owen, Narcissa R. Owen, and the Beasleys, and if there was any thing in the face of the will, or in the proof in the case, showing that the testator intended to impose any condition, or burthen either or all of those legacies with the payment of a portion of his debts, or charge them with any other burthen, then it would follow, as he had not expressed his whole mind upon those legacies they should not be established as his will thus far: but if no condition, qualification or burthen was intended, but the testator had expressed his full mind and purpose as to those legacies, they might be set up as his will, as to the personalty, although he had not completed his whole will, unless the same was invalid for some other cause.

Another question raised in argument is, that as the real and personal property is directed to be sold to raise the money-legacies and the will is not good to pass the real estate, or to authorise its sale, the legacies themselves could not be set up as the will of the testator. Upon this question, the court charged the jury, if the will gave a legacy, and the same clause giving the legacy charged it upon real estate, or charged it on real and personal estate both, and did not specify the portion to be raised from each fund, and the legacy to be raised, was limited to the fund provided, it might be in such case, the legacy could not take effect unless the will was made with the solemnity required to pass real estate. But the legacies in this will were given generally in different items: in one item he directs the real and personal estate to be sold as the *modus* of payment; in such case I understand the legacy is a charge upon the estate, and if it cannot be raised out of one of the funds pointed out as the *modus* of payment, it may be made out of other funds of the estate, or in other words, it may be raised entirely out of the personalty; the law in such case prefers the legatee to the heir or distributee.

The court also charged the jury, this will was not good to pass the real estate, or to authorise the sale, inasmuch as it had not been finished and signed by the testator, and attested by two witnesses in his presence and at his request, and if they believed the concluding clause in the will, appointing an executor, had been written when he was insensible, or if sensible, if it was written out of

[Guthrie, et ux. vs. Owen.]

his presence, and not shown to and approved by him, or if written after his death, it would be void, although the writer might have been directed verbally at the commencement of the will to appoint the same person executor, and if they found in favor of the will, they ought to except so much as directs a sale of the real estate and this concluding clause.

After the court concluded the charge to the jury, the defendant's counsel asked the court to charge, that when a will is made of both real and personal estate, and it is not good as to realty, it will not be set up as to the personalty, if it is not on its face a perfect and finished will of personal estate.

The court said it could not assent to the proposition as stated; it might be set up or established as a will of personal estate only, though made for both real and personal; although it be not good for realty, and although upon its face it is not a perfect and finished will of personal estate. It depended upon other circumstances whether such a will could be set up as to the personal estate, which the court thought had been already sufficiently explained in its charge already delivered.

The jury returned a verdict, in which they declared that the paper writing offered for probate as the last will and testament of Samuel Owen, deceased, was so far as said instrument purported to dispose of his personal estate, the last will and testament of the decedent; but that so far as said paper writing, purported to devise the real estate of the said Owen, it was not his last will and testament. They also found that the clause in said paper, appointing James C. Owen his executor, and the attestation clause were not the will of the decedent.

The counsel for the defendant moved the court for a new trial. This motion was overruled and judgment rendered on the finding of the jury, establishing the paper as the will of the deceased as to his personal estate, and that so far the paper should be certified to the county court of Williamson as the will of the deceased, and that the defendants should pay the costs of the suit.

From this judgment the defendants appealed in error to the supreme court.

Alexander, for plaintiffs in error. If a further act is contemplated to be done by testator, the will is void. 4th Wend. Rep. 170: 2 Ecl. Rep. 60: 4th Ecl. Rep. 109. The charge of the

[Guthrie, et ux. vs. Owen.]

court makes the delay of Ferdinand Moore to finish the will, equivalent to a prevention from doing so by the act of God, which doctrine is not sanctioned by law. It must be shown by proof there was no change of intention in the interval, and there is no such proof here. *Johnson vs. Johnson*, 1st Ecl. Rep. 159: *Devereaux vs. Bullock*, 1st Ecl. Rep. 35, 40. If the testator dies while the instrument is in progress, it will not be established as far as it goes, unless the court can infer, that by pronouncing for it they will carry into effect what, from all the circumstances of the case, was the desire of the deceased. Roberts on Wills, 151 to 154, inclusive: Shepherd's Touchstone, 407: Toller, 2, 3: *Montefiore vs. Montefiore*, 2d Ecl. Rep. 340, 343. There is no case where the instructions to write a will were unfinished, that the paper has been established as a will. *Devereaux vs. Bullock*, 1st Ecl. Rep. 35, 40. The decisions in England in force in New York at the adoption of the common law by their constitution, 1775, govern that State, and not subsequent English decisions. 4th Wend. Rep. 170. The English rule, that a will devising real and personal property, not attested, was good for the personalty, established by the case of *Cobbald vs. Bass*, 4th Ves. Rep. 201, have been changed in England. In *Walker vs. Walker*, 1st Mer. Rep. 503, the counsel for the will admit a change of that rule of law, 508-9; cases cited against the will, 512, 512, overruling *Cobbald vs. Bass*. So 1st Paige, 347, 375-6-7-8, 382: *Matthews vs. Warner*, 4th Ves. Rep. 186 to 193, change of intention presumed, 197-8: Chancellor's opinion, 208-9, 210: same will disallowed, 5th Ves. Rep. 23. This doctrine will apply at any rate to an instrument which is not a complete and finished will, to pass property. 3d Paige Rep. 378.

As to an instrument purporting to devise both real and personal property which are so blended together therein, that one cannot pass without the other, so as to effectuate the intention of the testator, the best rule in this country, is that adopted in the case of *Sturdevant vs. Goodrich*, 3d Yer. Rep. 96, that an equal disposition should be made of a man's property among his next of kin.

Marshall, Foster and Ewing, for defendant, cited following authorities: 1st Wms. on Ex'rs, 50, 54: *Cogbill vs. Cogbill*, 2d Hen. & Mun. 514: *Montefiore vs. Montefiore*, 2 Ecl. R. 341-2: *Johnson vs. Johnson*, 1 Ecl. R. 159: *ibid.* 465; 1 Ecl. R. 32, 34: 1 Ecl. R. 31: 1 Ecl. R. 481: Pock's R. 301: Wms. on Ex'rs, 15.

[Guthrie, et ux. vs. Owen.]

D. Campbell, for plaintiffs in error. The error that exists in the charge of the court below, is conceived to consist in a failure properly to discriminate between that which is merely an unfinished testamentary paper, and that which is an imperfect one. Though the paper propounded as the last will of Samuel Owen, be an unfinished and incomplete instrument, yet it is no doubt true, it may be set up as his will, if it perfectly expresses his intention as to the disposition which he desires to be made of his estate after his death, and is, therefore, a complete and perfect will. An unfinished or incomplete will may be defined to be a paper which is not clothed with all the legal and formal requisites of a will, but which clearly expresses the final and fixed intention of the testator as to the disposition of his property. An imperfect will, is a paper which however complete it may be in all other respects, does not express the full and whole intention of the testator, as to the disposition of his property. 1st Williams on Ex'rs, 50: *Montefiore vs. Montefiore*, 2d Ad. 357. The reason of this distinction between these two classes of instruments will be at once perceived, if we reflect for a moment upon the nature of last wills and testaments. What then is a will? It is the intention of the testator as to the disposition which shall be made of his estate after his death, clothed in the necessary legal forms; two things only then need concur in an instrument to constitute it a valid will; that it contain the fixed and final intention of the maker, and have the necessary forms. Try the paper whose validity is in contest by this rule. Does it express the intention of the testator as to the disposal of his property? The paper itself answers that question. It provides that his real and personal estate shall be sold and its proceeds appropriated to the payment of the several money legacies bequeathed by it, but his intention in respect to this disposition and appropriation of his real estate cannot be effected, because the paper is unattested by two witnesses, which the law requires to make it valid to pass land; the land does not, therefore, pass by it; but if it be set up as to his personal estate, the whole of that estate must either be consumed by those legacies or *they* must fail. Now it is beyond doubt that neither of these things were intended to be effected by that paper. What would have been the reply of Owen if he had been asked on the evening before his death, whether he intended that his real estate should descend to his heirs at law, and his personal estate go entirely to the money-legatees? It would doubtless have been, that

[Guthrie, et ux. vs. Owen.]

such was not his design, but that his real estate should be appropriated to the discharge of those legacies. The court below, however, have discovered another and a different intention for him. As there is a rule of construction sometimes acted upon in courts, which would authorise in a proper case, perhaps, the payment of the legacies entirely out of the personal estate, that court has held the will valid as to those legacies. This is not to find what was the will of the testator as to the disposal of his property, but to make a will for him. He says, "*my will* is, that my *real* estate shall be appropriated to the discharge of those legacies." No, says the court, they cannot be paid out of that fund, for the want of the necessary legal formality in the execution of the paper, but then they shall be paid wholly out of his personal estate.

This case may be regarded in another aspect. If the intention of the testator constitutes one of the chief requisites of a will, where must that intention or the evidence of it be looked for? In the terms of the paper? or, in a rule of construction, acted upon in the courts of equity, of which he had, when he prepared the paper, not the slightest idea? Whether a paper be the will of a particular individual, certainly depends upon whether he so intended it to be. But the rule adopted in this case makes it rest upon the fact, whether the ingenuity of the courts can discover any mode of construction by which they can give effect to the instrument, however different that effect may be from the one the testator designed it to have. This is certainly too dangerous and arbitrary a power to entrust any judicial tribunal with. If established, the wills of individuals will not be such dispositions of their property as they intended to make, but such as the courts see fit to make for them. The rule as to imperfect papers is thus stated by Sir John Nichol, in his judgment in the before cited case of *Montefiore vs. Montefiore*, 2d Ad. 342: "It must be clearly made to appear upon a just view of all the circumstances of the case, that the deceased had come to a *final* resolution in respect to it, *as far as it goes*; so that by establishing it even in its imperfect state, the court will *give effect* to, and not thwart or defeat the testator's real wishes and intentions, in respect to the property which it purports to bequeath, in order to entitle such a paper to probate, in any case, in my judgment." Let us try the alledged will of Owen by this test. Will the court give effect to the real understanding and intentions of Owen in respect to the estate bequeathed by this paper, by setting

[Guthrie, et ux. vs. Owen.]

it up as his will as to the personalty alone? This question is answered by the charge of the court below, that the paper is not valid to pass the real estate which was designed by the testator to constitute part of the fund to discharge his legacies. It is no answer to this question, to say such a construction may be given the paper as will render the legacies effectual, by paying them wholly out of another fund, since that very proposition contains the admission, that such was not the intention of the testator; it therefore thwarts and defeats his real wishes and intentions. If, therefore, Sir John Nichol has laid down the law correctly, this paper cannot be established as the will of Owen; and that he has laid down the law correctly is apparent from the authorities. Thus Williams says, "where there is a mere want of execution in a paper which is complete in other respects, the court will presume the testator's intentions to be expressed in such paper on its being satisfactorily shown, that the non-execution did not arise from abandonment of those intentions so expressed; but where a paper is incomplete in the body of it, the court must be perfectly satisfied by proof: First. That the deceased had finally decided to make the disposition of his property expressed in the imperfect paper. Secondly. That he never abandoned that intention, and was only prevented by the act of God from proceeding to the completion of his will." Surely the case where the paper propounded as a will, fails to make the disposition of his property expressed in it, from its being so imperfect as not to pass the whole of that property, falls within the rule thus stated by Williams, and cannot be set up in part. *Griffin vs. Griffin*, 4 Ves. 197: *Sanford vs. Vaughn*, 1st Phil. 48: *Devereaux vs. Bullock*, *ibid.* 60: 3d *ibid.* 104: 3d *ibid.* 504: *Forbes vs. Gordon*, 3d *ibid.* 614: 1st Adams, 129: *ibid.* 52: 1st Ad. 399: *Jameson vs. Cook*, 1st Hag. 82: 1st *ibid.* 140: *ibid.* 661: *ibid.* 485, 551, 643: 2d *ibid.* 249. Indeed, the very reason assigned by the judge below, as the ground on which the will should be sustained, is the precise reason why it cannot be. The court said, if it appeared that the testator had expressed his final and fixed purpose and intent with regard to the legacies given, then the will could be set up as far as it had gone. Now that position is decisive against the validity of the will. It cannot be denied, that the *full purpose* and *intent* of Owen was, that the *legacies* given should be paid out of the *land* as well as the personal estate. How does a paper, imperfect in this way, differ from one in which the imperfection is in

[Guthrie, et ux. vs. Owen.]

the bequest itself. Here the object of testator is, that the whole paper shall constitute his will, and pass both his real and personal estate as a fund to discharge his legacies. There was no *intent* to bequeath the personal estate *alone*. It is doubtless true that the testator expressed his full purpose and intent, as to the persons who should take legacies, and as to the amount of those legacies. But then it is just as true that this was not his *whole intent*. It is beyond question, that there was a *further purpose and intent*, and that was, that those legacies should not be paid out of his personal estate *alone*, but that they should be discharged out of his *whole estate*, real and personal. This is like the devise of an estate upon condition, and falls within the principle laid down in Shepherd's Touchstone: "But if a man bid the notary write a devise of his land to J. S. upon condition, and the notary write a devise to J. S., but the testator dieth before he can write the condition, in this case the whole devise is void;" p. 408. Here then was a condition in the mind of the testator, that his real estate should *pass* by his will, to aid in discharge of the legacies. The payment of the legacies is dependent, in his contemplation, upon his will passing the land. The case of *Roose vs. Mousdale*, 1st Ad. 3d Ecl. Rep. 48, sustains the position, that such a paper as this cannot be established as a will. There the court go upon the principle, that where the testator regarded a paper as a finished and complete will, and meant it to operate as such, it may be established, though it be unfinished. The corollary from that principle is, that if the facts show he did not regard it as a perfect instrument, it cannot be established, or though it be perfect on its face as to the disposition of his estate, yet, if it can only be set up in part, and thus becomes *imperfect*, it cannot be his will. *Masterman vs. Maberly*, 2 Hag. 235: 4th Ecl. 103. Here the disposition of the personal estate did not depend upon the devise of the realty. The same remark is applicable to all the other cases before cited, in which there were bequests of personalty and devises of realty, though, indeed, in a greater portion of those cases the papers propounded, contained bequests of personal estate *alone*. It is an entire misapprehension of the ground on which the validity of this paper is resisted to assume, as the counsel on the part of the defendant do, that resort is had to the construction of it, to show it cannot be set up. The state of the instrument at the time the testator ceased to work on it, and last saw it, is resorted to as evidence, and *conclusive evi-*

[Guthrie, et ux. vs. Owen.]

dence, that he had no *intention* it should operate upon his personal estate alone, but that he regarded the *whole paper* as his will, and if it cannot be given effect to as a *whole*, his intention is "thwarted and defeated," and not rendered *effective*. The doctrine of construction as to legacies was resorted to by the Judge to escape from this dilemma; the counsel of Guthrie and wife made no allusion to that doctrine. The question upon which they asked the charge of the court, as will be seen from the last passage in his charge, was a *wholly* different and distinct one. There certainly cannot be a doubt entertained, that the state of the instrument, as it leaves the *consideration* of the testator, is a subject of contemplation as *evidence* to ascertain what was his intention. The case of *Cartwright vs. Cartwright*, is clear to show, that the state of the *instrument* may be looked to, to ascertain whether it be the will of the testator. There the proof was clear that the testatrix had been in a state of *mental* derangement, both prior and subsequent to the execution of the will, and the question was, whether the will was executed in a *lucid interval*, and the court decided from the face of the will *alone*, as it made a sensible disposition of her property, that it was a valid will; a sensible act being *clear* and *full evidence* of sanity in the testatrix.

REESE, J. delivered the opinion of the court.

Samuel Owen, in his last illness, and the day before his death, caused one of his neighbors to be sent for, with the purpose of having his last will prepared. He had for some years been unable to speak, but could readily communicate his thoughts by signs to the family, and also to them, and to others, by indicating words in a dictionary. He was in the full possession of his mental faculties. To the draughtsman of the paper propounded as his will, he indicated his wishes in the manner above stated, by pointing to the leading and important words in a dictionary. When the clauses were written in this manner, they were separately read to him, and he assented to each, and when they were all written he read the entire instrument as far as prepared, himself, and assented to the whole, and this comprised the entire instrument propounded as his will, except the appointment of an executor, and the attestation clause. The process of preparing the instrument was tedious and exhausting, the draughtsman not in good health, and at 10 or 11

[Guthrie, et ux. vs. Owen.]

o'clock at night, having completed the instrument to the point stated, the further progress in it was suspended. Business required the draughtsman to leave early in the morning, but he promised the deceased to return in the evening to finish the matter; he did then return, but Samuel Owen was then out of his mind, and incapable of transacting business, and shortly after died. In the course of drawing up the paper, the draughtsman had learned from the deceased, that he wished James C. Owen to be his executor, and he, therefore, added the clause appointing him to that office, and the attestation-clause. The paper propounded as the will of Samuel Owen, is as follows :

"I, Samuel Owen, do make and publish this my last will and testament, hereby revoking and making void all other wills by me at any time made. First. I direct that my just debts be paid, as soon after my death as possible, out of any monies I may die possessed of, or may come into the hands of my executor. Secondly. I give and bequeath to my brother James C. Owen, my boy Stephen, my carriage, my gold watch, my young gray horse by Sir William, also one thousand dollars of Turnpike stock, to wit, twenty shares in the Harpeth Turnpike. Thirdly. I give and bequeath to my niece Narcissa Robert Owen my bed, my sorrel filly by Pacific, also one thousand dollars of Turnpike stock, to wit, twenty shares in the Harpeth Turnpike. It is also my will, that James C. Owen hold the above named items as agent for the above named Narcissa R. Owen, and use it as agent for her benefit, and in the event of her decease, without issue, it is my will that the said James C. Owen shall have said property. Fourthly. I give to my brother James C. Owen, for the benefit of my three nephews, Burnett H. Beasley, Charles C. Beasley and Felix O. Beasley, and I hereby constitute and appoint him agent, to hold, to use and disburse for their (the said Beasleys) benefit, the following items, to wit, one thousand dollars in Turnpike stock, to wit, twenty shares in the Harpeth Turnpike. Fifthly. I will and bequeath my executor sell my land, lying on Mill creek, also my negro man Tom, also my land in Warren and Cannon counties, to wit, my interest in these lands. I will to be sold also, all other property, of whatsoever description, of which I may die possessed of, and the proceeds of which, together with the monies in my possession at the time of my decease, also the money due to me by bonds or accounts, when collected, to be appropriated as above bequeathed. If any

[Guthrie, et ux. vs. Owen.]

surplus should remain in the hands of my executor—My desire is, that Tom should select himself a home, and be sold privately for a moderate price. Sixthly. I leave in the hands of my executor, of the money due me and to be raised as above directed, one hundred dollars for erecting tombs, and fifty dollars for fencing graveyard.” (I do hereby nominate and appoint James C. Owen my executor. In testimony whereof, I do, to this my last will, set my hand and seal, this 20th October, 1838. Signed, sealed and published in our presence, and we have subscribed our names hereto, this 20th day of October, 1838. Ferdinand Moore. Everett Owen.)

The above paper, except as to the latter portion of it, enclosed in brackets, containing the appointment of an executor, and an attestation-clause, and except, also, as to the real estate, was found by the jury in the circuit court, to be the last will and testament of Samuel Owen. Guthrie and wife, by their counsel, moved for a new trial, which being refused, they have prosecuted their writ of error to this court.

The correctness of the charge of the court, set forth in the record, has been but slightly questioned in the argument here, except in one particular, which we shall hereafter indicate. The argument of counsel has turned mainly upon the facts and circumstances attending the drawing up of the paper propounded, upon the state in which it was left, and the bequests contained in it. The instrument is *unexecuted*, and so far merely as relates to the appointment of an executor, and a clause of attestation, it is *imperfect*. It has not been controverted, that a paper *unexecuted*, and, in some instances, an imperfect paper may be set up as a testament, where the want of *execution*, or its being *imperfect* has been produced, not by abandonment, or change of purpose, on the part of testator, but by the act of God, that is, by extreme illness, mental alienation, sudden death, &c., if the paper, as *far as it goes*, express the will of the deceased, continuing to the time of his death, and if upon the face of the instrument it can be seen, that the legacies given to the objects of testator's bounty, and the benefits conferred, would not, if the will had been finished, have been burthened with charges in favor of others: in short, if it express his *whole will as far as it goes*.

The paper before us, was prepared slowly and with great deliberation, and under circumstances which made it more than ordinarily the work of testator himself. It was nearly finished; it proba-

[Guthrie, et ux. vs. Owen.]

bly comprised in its scope, *all* the objects of testator's bounty, and the frame of the instrument, the nature of the bequests, and the powers conferred in order to raise the money to pay the legacies, make it manifest, that if any thing had been added, it would not have been in the nature of a *deduction* from the legacies, or a charge or burthen upon them. The manner in which the will was made, the deliberation and sanction of it, as a whole, the circumstances which suspended its progress to a full completion, and the brief interval which elapsed before testator became unable to complete it, repel the notion of any change of purpose, and warranted the jury in arriving at the conclusion, that it contained his will to the time of his death. We think this instrument is sustained by the principles so distinctly announced by Sir John Nichol, in the case of *Montefiore vs. Montefiore*, 2d Eng. Ecl. Rep. 342, a case on which the circuit court in its charge to the jury, and the counsel on *both sides*, seem to have much relied. The learned and able judge in that case, observes, "that the legal principles, as to testamentary papers of every description, vary much as to the stage of maturity, at which those papers have arrived. The presumption of law, indeed, is against every testamentary paper not actually *executed* by the testator. But if the paper be complete in all *other* respects, that presumption is slight and feeble, and one comparatively easily repelled. But where a paper is *unfinished*, as well as *unexecuted*, (especially where it is just began, and contains only a few clauses or bequests,) not only must its being unfinished and unexecuted be accounted for, but it must also be *proved* (for the court will not presume it) to express the testator's intentions, in order to repel the legal presumption against its validity. It must be clearly made to appear, upon a just view of all the facts and circumstances of the case, that the deceased had come to a *final* resolution respecting it *as far as it goes*, so that, by establishing it, even in such its imperfect state, the court will give effect to, and not thwart or defeat, the testator's real wishes and intentions, in respect to the property which it purports to bequeath, in order to entitle such a paper to probate, in any case, in my opinion." In the many cases referred to, or existing on this subject, there is, perhaps, none which contains language or announces a principle subjecting papers of this description to a severer test, when propounded for probate. Yet, the case before us, is so made out, we think as to abide that test. The chief argument, however, against the

[Guthrie, et ux. vs. Owen.]

validity of the instrument upon the record, offered to us here, attempts to seek its support in the principle stated, that the court must see to it, that in establishing such unfinished paper, they give effect to, not thwart and defeat the real wishes, and purposes of the deceased. For it is said, his will was, that his land should be sold ; and you cannot, therefore, give effect to the *entire* wish of the testator. But this is a mistaken view of the matter. The real wishes and purposes of the deceased, referred to by Sir John Nichol, relate to the objects of testator's bounty, who, if the will had been finished, might have been brought forward to participate in some measure in the bequests given to those named. If the real as well as the personal estate be given to the same objects of the testator's bounty, or the real estate be directed to be sold to pay legacies to them, and the paper is not so finished and so executed as to pass real estate, you cannot be said to thwart and defeat the real wishes of the testator, if you give to the objects of his bounty, all you can, the personal estate. To refuse to do that, because you cannot give effect to his entire wishes in their behalf, nor make his bounty so ample, as he intended, would be to thwart and defeat, not to give effect to the sense and meaning of Sir John Nichol. If, indeed, in an unexecuted instrument, personal property be given to A, and real to B, and from sudden death, the testator cannot finish the instrument so that the land cannot pass, it might be doubtful, whether in such a case, if the will were set up, as to the personal property, the real wishes of the testator, if he could have foreseen such a state of things, would not be defeated thereby. But here the land is to be sold to pay the money-legacies, for it is in proof, that the testator had not Turnpike stock, and, therefore, meant the money-legacies to be so invested. What the court says, in its charge to the jury, on the subject of the course of a court of chancery, where a charge is made on both real and personal property, that the latter must be first sold and exhausted before the former can be called in aid, is admitted by the counsel of plaintiffs to be correct, but is alleged to have been misplaced and irrelevant, and calculated to mislead the jury. We do not perceive the ground on which the plaintiffs in error, can complain of that part of the charge, nor how, if it were held to be irrelevant, it could have misled the jury.

Upon the whole, we think, there is nothing which on grounds of law or fact, ought to disturb the verdict and judgment which have been rendered in the case, and we, therefore, affirm them.

PERRY and PATTERSON, ADM'RS vs. GILL, Ex'R.

1. Gill made a conveyance of certain slaves to his wife, to take effect after his death, the said slaves at the time of such conveyance belonging to him and being in his possession: Held, that this deed was void and conveyed nothing to the wife.

2. Where such conveyance of slaves in remainder by the husband as aforesaid, also contained a stipulation, that if she died before him she might dispose of such slaves by will, and the wife did so dispose of them and died: Held, said will passed no interest in the slaves. If, however, he had probate made of it and delivered the slaves in accordance therewith, the property passed, creditors being out of the question.

3. Where, however, there was no probate made by the husband after the death of the wife and no delivery made, and the property by the effect of the instruments and the conduct of the husband in connexion therewith transferred the slaves to the appointees of the wife as the donees of the husband: Held, that the administrators of the wife with the will annexed, would not be entitled to a decree for the slaves or an account for hire, they having no interest except in their representative character and in the testamentary validity of an instrument of which probate has been made.

Perry and Patterson, administrators of Sarah Gill, with the will annexed, filed this bill in the chancery court at Columbia, against Robert R. Gill, executor of Thomas Gill, deceased, praying, that certain slaves and other personal property might be decreed to be surrendered to them, and for an account of hire, &c. It appears that Thomas Gill, the father of ten children, at an advanced period of life, intermarried with Sarah, a childless widow, with several collateral relations. Said Sarah, at the time of the marriage, owned a negro woman Rhoda and her child George, and numerous articles of household furniture and some farm stock. Thomas Gill was likewise possessed of a considerable real and personal estate. The bill charges, that at the time of the marriage, there was a verbal agreement, that the property of the parties should be kept separate, and that each should have the power of disposing thereof, and that during the entire existence of the period of coverture, Mrs. Gill controlled the property which she possessed before marriage, paid her own debts, and acted in all respects in regard to her worldly affairs as a feme sole. These allegations, however, of the bill were denied in the answer, and though there was much proof tending to show that such was the fact, yet it was not fully and conclusively proved. On the 23d day of July, 1833, Thomas Gill executed a deed, which witnessed, that "the said Thomas Gill, de-

[Perry, et al. vs. Gill.]

siring to provide for the comfort, support and maintenance of my said wife, Sarah Gill, after my decease, do hereby give, grant and confirm unto her after my death the following property, to wit, Rhoda and her child George, with said Rhoda's future increase" (and some household furniture and farm stock) "to be hers at my death or her heirs or assigns for ever, guaranteeing further unto her the right, if she should die before me, previous to her death by will to devise to whom she will, all or any part of said property to go to her legatee or legatees immediately after her death; provided, and this gift is upon the express condition, that if she survive me and I die intestate, she is to lay no claim to any part of my other property, real or personal."

This deed of gift was proven by two subscribing witnesses on the 7th day of March, 1834, and registered on the 30th day of October, 1834. Thomas Gill made his last will and testament. He did not dispose of the property mentioned in the deed of gift further than may have been effected by the second clause, which is as follows:

"Having heretofore by deed of gift given to my present wife Sarah Gill all the property she owned when we were married, I further bequeath to her one horse beast of the value of \$45, and \$15 in cash, to be paid her after my death by my executors, also such cupboard ware and knives and forks as she may claim as hers at my death."

This will was duly proven and recorded. On the 4th day of February, 1834, Sarah Gill, (Thomas Gill being yet alive) made her last will and testament. It was written at the house of her husband and with his knowledge. It does not appear, however, that on this occasion he either gave his assent to the making of this will or to the terms thereof or that he dissented therefrom. She directed that her negro woman, Rhoda and her two children, and the balance of the property claimed by her be sold and the proceeds thereof equally divided amongst her five nieces. She also made a specific bequest of the horse willed to her by her husband and the \$15 directed to be paid to her by her husband's executors.

She appointed Thomas Gill, Jr. and R. Bryant her executors. She died before her husband, and her will was proven and recorded according to law. Gill and Bryant renounced the executorship, and Perry and Patterson, complainants, took out letters of administration with the will annexed. The administrators made

[Perry, et al. vs. Gill.]

an effort to sell the property mentioned in the will, but failed so to do, no person being willing to bid therefor unless Thomas Gill would give title, which he refused to do, alledging that he had once made a deed of gift to his wife for the property, and that he might get himself into difficulties by making deeds again to purchasers at the sale. He, however, interposed no obstacle to the sale, nor did he express any dissatisfaction at the attempt to sell.

The property remained in his possession till his death, and his executor, Robert Gill, took possession of it as the property of his testator. The administrators of Sarah Gill demanded the property of the executor of Thomas Gill, with an account of the hire, but the surrender was refused, and this bill was filed to obtain the property and an account for hire.

It came on to be heard before chancellor Bramlett, at the September term, 1840, upon bill, answer, replication and proof, who being of the opinion that complainants were entitled to relief, decreed a surrender of the property and an account, &c. The defendant appealed to the supreme court.

Cahal, for complainants. The first question is, whether a husband can make a gift to his wife without the intervention of a trustee. That it can be done is well settled. If there is no trustee, equity will hold the husband himself a trustee for the wife. See 2 Story's Equity, 607, 8. Clancy 257, 8, 9; 7 John. C. R. 57.

The next question is, can a married woman make a will with the consent of her husband? It has been long and well settled that she can. 7 Bac. Abr. 301; 1 Wms. on Exrs. 40, 1, 2.

But if both these positions were as clearly against the validity of this paper as they are unquestionably in favor of it, the court could give effect to it as the will of Thomas Gill. A married woman may make a will of her husband's property with his consent, and if he does not dissent before probate, it passes to the legatee. 7 Bac. Abg. 301: 1 Mod. 211: 2 Mod. 172: 12 Mass. 525: 2 Dess. 67.

By the express terms of the deed of gift in this case, Mrs. Gill was authorised, in case of her death before her husband, to make a will and dispose of the property. She made her will with the full knowledge of her husband. After her death it was proved, and though he knew all that was done, so far from dissenting, the evidence authorizes us to believe that he approved of it. It is surely

[Perry, et al. vs. Gill.]

too late now for his executor to repudiate all his testator sanctioned in his life-time.

But put the will aside altogether and the complainants are entitled to the property in controversy. They are the administrators of Sarah Gill and are entitled to all her personal estate. For whose benefit they will be trustees, when the property comes into their possession, should have no influence on the decision of this case. When they get the property they are bound to make distribution to those entitled. *McKay vs. Allen*, 6 Yer. 44. The husband is entitled to be appointed administrator of the wife, but if he die without having administered, the wife's next of kin will be appointed in exclusion of the husband's representatives. 1 Wms. on Ex'rs, 244: 2 Wms. on Ex'rs, 911.

Pillow, for defendant. The deed of gift to the wife is void to all intents and purposes. She was, while covert, incapable of taking and holding a general property in these slaves. If the deed had been made by a stranger, the property would have vested in the husband instantly. It secured nothing to the separate use of the wife. It did not exclude the husband from the control of it, and without this exclusion of the husband, no separate property can exist in the wife. Clancy, p. 265. This deed, securing to the wife no separate property, but at the most limiting to her, after the death of her husband, a general property in remainder in the negroes, a property, which would at once, by virtue of the marital right vest in the husband, is wholly inoperative and cannot be set up by this court.

The question next presented is, what was the effect in law, if Gill consented that his wife might make a will, disposing of, not her property, but property which was his? There are to be found in some of the old books some loose *dicta* saying, "it is said" that a married woman may with the assent of her husband make a will and dispose of all his property. They place it upon the ground that it is not her will but his will. These authorities do not refer to any adjudged case in which such a doctrine is established as law, but content themselves with saying, it is so said. But they even require the consent of the husband to the particular will at the time of probate.

It is stated that a married woman may, with the assent of her husband, make a will of her chattels, which he has not reduced to

[Perry, et al. vs. Gill.]

possession. There she is disposing of that which is hers—is not yet her husband's and cannot be, until he reduces it to possession. He is simply relinquishing his right to property to which he would be entitled as administrator. See Williams on Executors, p. 41, 2, 3. But the authorities go no further, (unless it be where some new consideration exists,) in authorizing a married woman to dispose of her husband's property with his assent. See same authority. If she have separate property, she may dispose of it by will without his assent, and it may be admitted to probate without his assent. Clancy, p. 308. But the will of a married woman, not of her separate property, but by virtue of a power, cannot be admitted to probate without the assent of the husband, first had to the particular will in contest. Clancy, p. 308: 2 Atkins, p. 49.

If the wife can, with the assent of her husband, make a will and dispose of his property, it must be upon the principle that she is executing a power of appointment created by his consent. There is no other principle upon which it can be placed. It will not do to say that the husband can thus confer all the powers of which the wife is deprived by law, and to say that such authorized acts of hers would have legal effect and operation as her will. It must be as I remarked, upon the principle of exercising a power of appointment created by the consent of the husband. But even then this will can have no effect. It cannot be acted upon and recognized by this court as her will, because the law requires, before it is admitted to probate, that the husband shall be examined as to his consent to the exercise of the power of appointment.

REESE, J. delivered the opinion of the court.

Thomas Gill in his life-time, with a view, as he alledges, to the comfort and maintainance of his wife after his death, and on condition that she should have no further interest in his estate, made a deed of gift to his wife in remainder of certain negroes and other property, but containing a stipulation, that if she died before him, she might dispose of the property by will, and her legatees should immediately thereafter enjoy the same. He afterwards made and published his will, and therein referred to the deed of gift and made for the wife some further provision. After this the wife made and executed in due form, a paper purporting to be her last will and testament and disposing of the property mentioned in

[Perry, et al. vs. Gill.]

the deed of gift to certain of her next of kin, and afterwards died, leaving the husband. He was cognizant at the time that his wife was occupied in the execution of the will, in an adjoining room; although it does not appear, that he had any precise knowledge of the contents of the instrument, other than he might be supposed to derive from the execution by him of the deed of gift; nor does he seem to have expressed any dissent from the proceedings at that time. Probate was had of the instrument in the county court, and the executors therein named renounced, and letters testamentary with the will annexed were granted to the complainants. The husband did not take any part in the proceeding upon the probate; he gave no assent, and he made no opposition, if he knew of it. Conversations of his on the subject, proved in the record, seemed to imply both his belief that the property passed, and his willingness that it should go to those claiming it under the will. Under these circumstances the question arises, whether the complainants are entitled to the relief prayed. And first as to the deed. It is a mere voluntary conveyance, in remainder, of personal property belonging to and in possession of the husband, to the wife, and to her assigns, and the husband survived her. So, as a deed of conveyance, it avails nothing. 2ndly as to the will. 1. A wife can make a will of property which is hers, not yet reduced into the husband's possession; but this with the assent of the husband, not in general, but to the particular will; and in such case, the assent avails nothing, unless he survive, it being but his waiver of his right of being her administrator. 2ndly for the separate property of the wife, a power of disposition by will exists independently of the assent of the husband. 3dly, where, by agreement before marriage, or subsequently, upon a valid consideration, a power of appointment by will is given to the wife, she may with the assent of the husband make a will; but even in such case as that, it is ruled by Lord Hardwick in the case of *Henley vs. Phillips*, "that though a feme covert has a power of disposing of a sum of money, or any other thing, by a writing purporting to be a will, yet after the wife's death the proving it in the spiritual court will not give it the authority of a will, but it will still be considered as an instrument only, or an appointment of such sum, or other thing in pursuance of the power, and before it is proved in the Commons as a testamentary conveyance, the husband ought to be examined there as to his consent, nor till then, will it have the effect and operation

[Keaton's distributees vs. Campbell, et als.]

of a will." 2 Atkins 48. But the case before us is hardly that case. It is nothing but a voluntary authority, without consideration, given by the husband to the wife to make a will of a certain portion of his property. If it operates at all it is as his will. If he has probate made of it and delivers the property, then, indeed, the property passes by his will, if it may be so called, creditors being out the question.

We have been anxious to sustain, if we could, the decree, rendered in this case, the more especially because we have a strong impression, that the effect of the instrument referred to, in connection with the conduct of Thomas Gill at and after the making of the last one, is to transfer the property in question from Thomas Gill to the appointees of his wife, as his donees. But these complainants sue as administrators with the will annexed, and they have no title or interest, except as the same may be found in their representative character, and in the testamentary validity of the instrument of which probate has been made. The decree must be reversed and the bill dismissed, but without costs and without prejudice.

KEATON'S distributees vs. CAMPBELL, et als.

John Keaton died in Missouri, having some personal property in that State, and some in the possession of his family in the State of Tennessee; W. Keaton administered on his estate in Tennessee, and gave sureties for the performance of this trust in Tennessee; he then went to Missouri, obtained letters of administration upon the estate of decedent in that State, and gave sureties for the performance of that trust: Held, that these trusts were distinct and independent of each other, and the sureties in one State not responsible to the distributees for the effects received into possession in the other; and this is so, though the administrator may have brought the property obtained in Missouri to Tennessee, converted it into cash, and made a return of the proceeds to the appropriate tribunal in Tennessee as assets.

This bill was filed in the chancery court at Winchester, by Lackey and wife, Bennett and wife, and Gibson and wife, distributees of the estate of John Keaton, deceased, against James Campbell, J. H. Bradford and Elizabeth Keaton, securities of William Keaton, administrator of said John Keaton's estate. It was filed on the 19th day of February, 1839, and prayed for an account and distribution of the estate, amongst those entitled, according to law.

[Keaton's distributees vs. Campbell, et als.]

The facts of the case are substantially as follows:

John Keaton, after having resided in Franklin county, Tennessee, between 25 and 27 years, about the spring of 1825, went to Missouri, leaving behind him his family and "*some property, consisting of household furniture and necessities,*" and taking with him about 20 negroes, horses, wagons, stock, &c. He lived in Missouri, treating that State as his domicil, till his death, on the 2d of September, 1826, when his property consisted of about the same things which he had taken with him. Whether he had finally abandoned the county of Franklin, as a place of residence, does not certainly appear.

The probate court of Jefferson county, Missouri, on the 4th day of September, 1826, granted administration *ad colligendum*, to one Michael Taney, who had been Keaton's partner in that State, and he executed a bond with surety, in the penalty of five thousand dollars, conditioned to collect all the estate, personal and real, of the deceased, make an inventory thereof, and safely keep and deliver it to the administrator to be afterwards appointed. On the 18th September, 1826, administration of the estate was granted by the same court to the same Taney, conditioned as usual for the administration of the estate. On the 5th and 6th, 1826, a list of his property was made by appraisers, and it consisted of 18 negroes, horse, saddle, saddle-bags, wagon, &c. &c. The appraisers valued the whole at \$5189, and their proceedings were returned to the probate court on the 18th September, 1826, on which day the administrator also filed a list of notes amounting to \$139 87½. On the 2d of October, an additional appraised inventory was filed, consisting of two slaves. On the 3d of October, there was a sale of certain of the personal property. Thus far things had gone on in Missouri, when, on the 8th of October, Elizabeth Keaton, the widow of the deceased, still residing in Franklin county, Tennessee, by power of attorney under seal, reciting that she had heard of her husband's death by letter, appointed William Keaton her agent "to transact all her business in Missouri, occasioned by the death of her husband," &c. On the 23d of October, William Keaton applied to the probate court of Jefferson, Missouri, for administration of John Keaton's estate, "in virtue of his being of kin to said deceased, and also because he was a creditor of the estate of the deceased," which application was made of record on the 28th of October. On the 6th of November he renewed this application, and both of

[Keaton's distributees, *vs.* Campbell, et als.]

them seem to have been filed in writing on the 11th of November.

Whilst this application or suit for the administration was thus pending before the probate court of Jefferson county, Missouri, the county court of Franklin county, Tennessee, on the 27th of November, granted administration of said John Keaton's estate to William Keaton, and he gave the usual administration bond, with the defendants as his sureties.

William Keaton now returned to Missouri, and resuming his suit for the administration there, moved the probate court on the 12th of December, to defer the consideration of his application till the 15th, on which day it was again continued, and Taney was ordered to hire the negroes, and a *dedimus* was given to Keaton to take depositions, to be read on the trial of his application. On the 6th of January, 1827, Taney made a further sale, which was filed on the 14th of March, and on the 15th Keaton having made proof to the court that he was of kin to the deceased and a creditor, the letters granted to Taney were revoked, and administration *de bonis non* granted to Keaton, on his giving bond, which he did, and was qualified; whereupon, Taney filed an inventory of notes, &c., and produced his accounts and vouchers for settlement, on which the estate was found in his debt \$156 73½.

The estate in Missouri was now in William Keaton's hands, and about the month of April he brought the negroes, who had been in Taney's possession, to Tennessee, Franklin county. On the 11th of September, 1827, Keaton made a settlement with the court of probate in Missouri, and was found in debt to the estate \$288 67½, on which he was required to pay interest by an order made, June 10th, 1828. On the 3d of November, 1830, he made a final settlement in Missouri, and was found in debt to the estate \$57 62.

After the removal of the negroes to Tennessee, they were hired out till the 18th of March, 1830, and on the 5th of that month, they were sold, and William Keaton became the purchaser of most of them. He returned inventories and accounts from time to time, showing sales of the personal property, hire of negroes, and rent of land. At November term, 1830, the county court of Franklin, appointed commissioners to settle with him, which appointment was renewed at February term, 1831, and on the 10th of March, 1831, a settlement was returned. In it he is charged with the sales of the negroes \$6,689 99, for insolvent debts 1,893 40, &c., in all amounting

[Keaton's distributees vs. Campbell, et al.]

to \$11,510 93 $\frac{1}{4}$, and the amount of insolvent debts, repayments, &c., being deducted, in all \$6,508 87 $\frac{1}{4}$, leaves a balance in his hands of \$5,002 35 $\frac{1}{4}$. On the 22d of March the same commissioners, under an order of February session, 1833, made an additional settlement, giving the administrator a further credit of \$923 28 $\frac{1}{4}$.

Mrs. Keaton was appointed guardian of her daughters at February session, 1831, and at November session, 1832, she made her first return, in which she charges herself with \$586 07 $\frac{1}{4}$ received by her as the distributive shares of her daughters, and as paid by the administrator of the estate.

At the August term, 1840, the case came on for final hearing on the bill, answer of the defendants, replication, exhibits and proof, when the counsel for the defendants suggested the death of defendant Elizabeth Keaton. The said Elizabeth Keaton died subsequent to the previous term of the court. It was then insisted by the defendants' counsel that the suit should be continued and renewed against the representatives of the decased, but the court being of the opinion that the complainants had the right to elect, whether they would renew against the representatives or proceed against the survivors, overruled this motion, and on the motion of complainants, ordered that the suit be abated. To this opinion the defendants excepted. The case was then heard. The chancellor being of the opinion that the securities on the administrator bond executed in Tennessee were liable for the respective distributive shares of said estate, which came to the hands of the administrator, either by virtue of his original letters of administration obtained in Tennessee, or the auxiliary letters obtained in Missouri, ordered the clerk and master to take an account of the entire estate of the intestate, which came to the hands of the administrator in each State, and that the settlements which had been made in each of the States by the authority of the courts, respectively, with each administrator, be taken as *prima facie* evidence of the facts contained therein in taking such account. The chancellor being further of the opinion that the purchase of the slaves by the administrator was void, directed the clerk to ascertain the value of the slaves at the time of the sale and purchase by the administrator, and charge him with such value, the previous hire and interest upon the value, &c.

From this decree the defendants appealed to the supreme court.

[Keaton's distributees *vs.* Campbell, et als.]

Taul, for the complainants, cited, and relied upon Story's conflict of laws, p. 242, 513, and *Harvey vs. Richards*, 1 Mason's Reports, 381.

The reporter regrets that it is out of his power to give a full statement of the argument of Mr. Taul on the important question involved in this case.

Meigs, for the defendants. In England—Probate in one province is *void* as to goods in the other. Williams, 124, sec. 2, note b: 1 Saund. 275, note c. Probate is the only evidence of right to personal property of intestate. 4 T. R. 258: 15 Eng. Com. Law Rep. 230, cited, Wentworth, 112. Probate jurisdiction depends upon the situation of the goods. 2 Ld. Raym. 855: 1 Petersdorff's Ab. 231, marginal, pl. 6: *Ibid.* 261, pl. 2, *Kegg vs. Horton*. In this country—The same principles prevail; and it has been decided, that the goods of the intestate being situate within a State, is what gives the probate courts of such State jurisdiction. *Embray vs. Millar*, 1 Alex. Marshall, 303. That where the property of a decedent is wholly in a foreign country, and some of it is brought to this after his death, no administration can be granted here, but the administrator appointed in the foreign country may act here, *Ibid.* 304: 4 Littell, 277: 5 Monroe, 47: Williams 174: Story's Conf. sec. 522, *i. e.* may maintain a personal action, the administration in the State where the goods are situated, making him owner in *propria persona*; Story's Conf. sec. 516, 517, 518. And when the administrator brings the property to another jurisdiction, he holds it in his own right, but as trustee. The remedy against a foreign administrator, who brings his assets here, must be pursued in the jurisdiction which granted his letters. Story's Conf. sec. 515, and authorities cited: *Logan vs. Fairlie*, 1 Cond. Eng. Chan. Rep. 459: *Davis vs. Davis*, 8 Pick. 475. The sureties only guaranty the administration of the effects lying within the State. 2 Mass. Rep. 394: 3 Missouri Rep. 490: 6 Pick. Rep. 481.

W. A. Cook, on the same side.

1. We contend that the sureties in the administration bond in the State of Tennessee, are not liable for the assets of intestate, received by the administrator in the State of Missouri, by virtue of his letters of administration in that State.

2. They are not responsible to the distributees for the assets re-

[Keaton's distributees vs. Campbell, et al.]

ceived in Tennessee, but they are discharged, as all those assets came to the hands of the administrator under the laws of Missouri, the administration in this State being auxiliary to the administration in Missouri, the domicil of the intestate, and all the assets received in this State, having come to his hands, he shall be presumed to hold them as administrator according to the laws of the domicil.

By the laws of Tennessee, at the death of the intestate, where the intestate died in this State, letters of administration could alone be granted in the county of the intestate's residence: in any other county they would be void. *Nelson's lessee vs. Griffin, et al.*, 2d Yerg. 624. Where intestate resided out of the State, the courts generally had no power to grant letters of administration, but the courts of the different counties, where any of the effects of the testator or intestate was situated, might grant letters, and these letters would extend to the bounds of the State, and prohibit other courts from granting them, though there should be property within their jurisdiction. Act of 1831, ch. 24, sec. 1, 2: *Brown vs. Wright*, 4 Yerg. Rep. 57.

Before the passage of the act of 1831, the county court, within whose jurisdiction any of the personal estate was situated, had power to grant letters testamentary or of administration on those assets. 4 Yerg. Rep. 57. Then what is the effect of the letters of administration in this State on the effects of a non-resident? By the act of 1831, they are made to cover all the effects within the bounds of the State. But how does the administrator represent the intestate? He certainly represents him fully, so far as his estate may be situated in the State at his death. But does it represent his person fully, or in other words, is he generally speaking the personal representative of the intestate? We contend his administration is special, and confined to the goods of the intestate within the State, and that farther than they extend, he is not his personal representative. If so, then, so far as his sureties are concerned, no account can be had, except for a due administration of those assets. This question may be tested, first, by principle.

Suppose A. dies in Missouri, and has effects in all the different States in the Union, and also in England, France and Holland, and administrations are taken out in each of these governments, and bond and security are given in each for their due administration. Which of these administrators is the general personal represen-

[Keaton's distributees vs. Campbell, et als.]

tative of the deceased? By the universal consent of nations, for the security of their citizens, and to prevent the greatest inconveniences, the personal effects of the intestate are to be distributed according to the laws of his domicil. He is supposed to be acquainted with the laws of his own State, and when he dies intestate, he is supposed to adopt those laws as his will, as to the disposition of his property. Amb. 25: Amb. 415: *Thorne vs. Watkins*, 2 Ves. 35: *Bruce vs. Bruce*, 2 Bos. & Pul. 229, note: 6 Bro. P. C. 566: *Balfour vs. Scott*, 6 Bro. P. C. 550: 3 Ves. Jun. 198: 1 Hen. Bl. 690: 6 Bro. P. C. 577: *Drummond vs. Drummond*, 6 Bro. P. C. 601: *Phillips vs. Hunter*, 2 Hen. Bl. 402: *Hunter vs. Potts*, 4 T. R. 182: *Somerville vs. Somerville*, 5 Ves. Rep. 750: *Dixon's ex'rs vs. Ramsay's ex'rs*, 3 Cranch, 319: *Goodwin vs. Jones*, 3 Mass. 514: *Richards vs. Dutch*, 8 Mass. Rep. 506: *Dawes vs. Boylston*, 9 Mass. Rep. 337: 5 East. 124: *Harvey vs. Richards*, 1 Mason's Rep. 381: *Dawes vs. Head*, 3 Pick. Rep. 128: *Hooker vs. Olmstead*, 6 Pick. 481: Story's Confl. of Laws, 403: 3 Paige's C. R. 182: 2 Hen. & John. Rep. 192, 224, 228: *Holmes vs. Ramsen*, 4 John. C. Rep. 469: 2 John. Rep. 229: 3 John. C. Rep. 190: Vattel, book 2, 85, 103, 110, 111. But, still, is there any general administrator, and if so, are the others independent or auxiliary? Upon this subject there is much contrariety of opinion in the books, and not a little confusion. Many judges and eminent writers maintain and hold, that the administration of the domicil is the principal or leading administration, and all others are subservient or auxiliary to it. So far as creditors are concerned, whatever may be the conflict of opinion in foreign countries, it is definitively settled in the United States, that each administration is independent. *Harvey vs. Richards*, 1 Mason, 381: *Dawes vs. Boylston*, 9 Mass. Rep. 337: *Selectmen of Boston vs. Boylston*, 4 Mass. Rep. 318, 384: 8 Mass. Rep. 506: *Dawes vs. Head*, 3 Pick. Rep. 128: *Hooker vs. Olmstead*, 6 Pick. Rep. 481: 8 Pick. 475: 10 Pick. 77: *Stephens vs. Gaylord*, 11 Mass. 256. Case of *Miller's estate*, 3 Rawle, 312; Story's Confl. 423. As between the administrators themselves, they must be considered as independent, for their letters have no ex-territorial effect, but are confined to the jurisdiction or State granting them, so that even the executor or administrator of the domicil cannot call any other administrator to account. *Lee vs. Moore*, Palm. R. 163: 3 P. Wms. 369: 2 Ves. 32: *Attorney General vs. Cockrell*, 1 Price's R. 179: 2 Madd. R. 101: 1 Hag. Ecl.

[Keaton's distributees vs. Campbell, et als.]

R. 93, 239: Mitf. P. 177: 1 Cranch, 259: *Dixon's ex'rs vs. Ramsay's ex'rs*, 3 Cranch, 319: 9 Wheat. 565: 12 Wheat. 169: 4 Rand. 158: 2 Gill. & John. 193: 3 Mass. 514; 5 Mass. 67: 11 Mass. 256, 313: 4 Mason's Rep. 16, 32: 5 Pick. 65: *Holmes vs. Ramsen*, 20 John. Rep. 229, 265: 5 Peters, 518: 7 Cowen, 64: 2 Sim. & Stewart. 284: 1 Dow. & Ry. Rep. 35: Story's Confl. of Laws, 422, 513: *Selectmen of Boston vs. Boylston*, 2 Mass. Rep. 384.

But suppose one administrator should voluntarily pay over the assets in his hands, after payment of debts, to the administrator of the domicil, would that be a good payment, and operate as a discharge of him and his securities? If the administration in the foreign State is to be regarded strictly as auxiliary to the administration of the domicil, then the payment by the auxiliary to the administrator of the domicil, according to the weight of authority, would be a discharge of the auxiliary administrator, and of course of his securities. *Harvey vs. Richards*, 1 Mason's Rep. 381: 5 Mason's Rep. 95: 1 Vern. Rep. 377: 11 Mass. Rep. 256. Case of *Miller's estate*, 3 Rawl. 312: *Dawes vs. Head*, 3 Pick. 128: *Hooker vs. Olmstead*, 6 Pick. 481: 8 Pick. 475: 10 Pick. 71: Story's Confl. of Law, 422, 423, 313.

But in considering this question, one important consideration ought to be taken into view, which does not seem to have been adverted to in any of the cases; that is, by the policy of the United States, on which their legislation is founded, the administrator has to give bond and security to the court of probate for the faithful discharge of the duties of his office. Will all payments to the administrator of the domicil charge the sureties in the bond of the domicil administrator? It would certainly be unjust and oppressive, if the sureties in the administration of the domicil should be held liable for all sums of money that might be paid over to him by the various administrators in foreign governments and States. The sureties could by no possibility know any thing of the amount of the assets in foreign governments; they might be acquainted with the effects in their own State, and be willing to stand as security for the administration of these funds, but would not do so if they were bound for assets in all the States of the Union, to an unknown amount.

It is made the duty of the court to take bond and good securities, and in a penalty of sufficient amount to cover the effects of the de-

[Keaton's distributees, *vs.* Campbell, et als.]

ceased. The court is presumed to know something of the situation of the property of its own citizens, and if not so acquainted, they can easily inform themselves thereof, by calling witnesses before them, and by qualifying the administrator; but as to effects in other governments, it would and could know nothing. What sureties are they then to require? A man of one substance would be sufficient to answer for all the effects in the local jurisdiction, and wholly insufficient to answer for all the assets in all the other States. To require unreasonable sureties or responsibilities, would be unjust and inconvenient, and would leave many estates unrepresented. In what penalty shall the bond be taken? Double the amount of the effects is usual, and is ample in amount. But double the amount of what assets? All the assets in the civilized world, or double the amount within the local jurisdiction?

How would it operate in practice? A man dies in Davidson county, administration is taken on his estate, with two sureties in the penalty of two thousand dollars, double the amount of the assets in Tennessee. It turns out that the intestate had assets to a large amount in several sister States, and also in England. Shall the sureties be held liable for these assets? But suppose administrations with securities are taken in the other States and governments, and all these administrators pay over the amounts in their hands to the administrator in Davidson; will these payments discharge such administrators and their sureties? If so, then, the whole estate will be in great jeopardy; for the sureties in Davidson are only bound for two thousand dollars, and all the other sureties are discharged. Again: would it not be contrary to all rule and all principle to make the sureties thus liable, their safety or their ruin to depend on the will of the foreign administrators? They cannot be compelled to pay over the amount in their hands to the administrator of the domicil. They may and are bound to pay over to the next of kin. *Harvey vs. Richards*, 1 Mason, and authorities referred to in that case. Shall they be permitted thus to hold in their hands the destinies of others? All society would reprobate such a decision.

But if that is so, would the converse of the proposition be true? Suppose the administrator of the domicil pays over to the auxiliary administrator or administrators in other States, will that discharge him and his sureties, and throw the burthen of the whole property, as well in the government of the domicil as in the govern-

[Keaton's distributees vs. Campbell, et al.]

ment of the auxiliary administration upon the sureties of the latter? Has any case ever been so decided? Has any jurist or legal writer ever laid down such a proposition? There certainly is no reason or propriety in the principal administrators paying over his assets to an auxiliary administrator. But suppose there are ten different foreign administrators. To which is he to make payment? or, can he pay to any he pleases and select which sureties he will sacrifice? The bonds of these auxiliary administrators, if they can be so called, are usually very small; as for instance, a debt may be due in a State of one or two hundred dollars, an administration is taken out, and a bond given in the penalty of two or four hundred dollars. Can the principal administrator, or administrator of the domicil, and all the other administrators discharge their sureties and themselves by paying over to this administrator? The consequence would be most disastrous. The whole policy of the law, requiring security, would be defeated, and no prudent man would be willing to become security, for he might be rendered liable in many instances to the penalty of his bond, when the whole assets in his State had been properly administered.

In England, no security is required of the administrator, but that he will return a correct inventory to the Ordinary. In the case before the court, the administrator under the laws of Missouri, the intestate's domicil, gave bond and security for his administration; he received there and inventoried all the negroes of said estate, who were in said State at the death of intestate, and the date of his administration there. He applied there on the ground that he was a creditor and of kin, and was appointed. He subsequently removed to this State, pretended to sell the negroes, bought most of them himself, and then returned to Missouri. Is there any pretence for charging the sureties here with the funds in his hands, received under the laws of Missouri? His inventorying them here a second time, surely can make no difference. They were still in his hands as administrator, as he first received them, and he cannot be considered in any other light than the domicil administrator with the effects in his hands as he originally received them. He cannot have it in his power to discharge one set of securities and charge the others by his mere will.

Suppose the administrator of the domicil receives assets in his nation, carries them to a foreign nation and pays them over to some administrator there, who immediately inventories them and returns

[Keaton's distributees vs. Campbell, et als.]

them to the original administrator. Are the first or domicil administrator and his sureties discharged, and the sureties of the foreign administrator fixed with all these assets?

The conclusion to which I arrive is, that the sureties for administrations in States other than the State of the domicil, are certainly only bound for a faithful administration of the assets within the local jurisdiction of his State, and which have not been reduced to possession by some one administrator, either domicil or other. He is not even bound for all the debts due in his State at the time of his administration, for these debts being of a transitory nature, and binding the person of the debtor wherever he may be, the debtor may pay to any legal administrator, out of his place, and the payment will be valid. For if he goes into another State, he may be sued and the debt recovered, and he cannot plead that he *lives* in another State. 6 John. Rep. 357: *Doolittle vs. Lewis*, 7 John. C. Rep. 47: *Campbell vs. Lowrey*, 7 Cowen, 67. So if the debtor comes into the State, the administrator is bound to sue him and collect the debt, or he will be liable for it. 3 Paige's C. Rep. 183.

That the administrator in one government, not the domicil, is not bound as such to account to the Ordinary where his administration is granted upon his bond given to that Ordinary for assets received as administrator in the State of the domicil, is decided in the following cases: *Selectmen of Boston vs. Boylston*, 2 Mass. Rep. 385: *Hooker vs. Olmstead*, 6 Pick. 481: *Stevens vs. Gaylord*, 11 Mass. Rep. 256, 262: 1 Dow. & Ry. Rep. 35: 3 Paige's C. Rep. 465: *Alsup vs. Alsup*, 10 Yer. Rep. 283.

The question, whether the administrator of another State is not liable to legatees and distributees in this State as a *trustee*, is altogether another question. That he is responsible as trustee, is established by the case of *Harvey vs. Richards*, 1 Mason's Rep. 381: *Alsup vs. Alsup*, 10 Yerg. Rep. 283: 7 Paige's C. Rep.: 7 Cowen's Rep. 642. In this latter case he is not liable upon his administration bonds as administrator but as trustee. If liable upon his bonds then, upon what bond? Upon the bond in the State where the bill is filed alone, holding the sureties liable for his maladministration or for assets received and not accounted for under all his administrations in other States, under other letters of administration, where other bonds were given with other securities? By no means. It is possible, if all the sureties upon all the bonds were before the court, they might be each held responsible for the assets

[Keaton's distributees vs. Campbell, et als.]

received in the different States, each set being liable for those received in his own State without the bill being multifarious. But upon no principle or authority can one set of securities be made responsible for the assets received, and covered by bonds in other States.

Suppose the administrator receives assets in one State, not of the domicil, then takes out administration in another State, out of the domicil, and returns inventories of those assets again in the other State, will that render the sureties under the last bond liable? Suppose he inventories all the assets received under different administrations in Europe and different States in the Union, in all the different countries, will that render all the sureties in all the States liable for all the assets received as administrator in foreign governments, and all the States in the Union? The doctrine is intolerable, absurd, and leads to the most ruinous consequences.

The case of *Pratt vs. Northam*, 5 Mason's Rep. is no authority to support the position. In that case, the administrator of the domicil appointed an agent to collect debts and effects of his intestate in England, and in order to effect that object, took out special auxiliary letters of administration in England, to collect those assets, and as such received them and paid them over to his principal, the original domicil administrator. In that case, judge Story was of opinion the sureties to the domicil administration were liable for those assets, but they were not subjected, the case going off on another point, the Statute of limitations. The case can, therefore, hardly be considered as an authority upon that state of facts, to wit, an agency and express auxiliary administration in a government other than the domicil. But no authority or *dictum* is to be found in the books, holding that sureties, situated as the defendants here are, are liable for assets received in the country of the domicil, under letters there issued, and it is believed that *Pratt vs. Northam*, cannot be supported by any authority.

REESE, J. delivered the opinion of the court.

John Keaton resided for many years in the county of Franklin, in this State. In the spring of 1825, he went to the State of Missouri, taking with him eighteen or twenty slaves. They constituted nearly the whole of his personal estate. He left behind him, however, his family and his household effects. He seems to have

[Keaton's distributees vs. Campbell, et al.]

employed his slaves, and to have occupied himself, in the State to which he had went, in the mining business, and had there a partner in conducting his operations. He paid a visit or two to his family after he left; but what were his intentions as to their future residence, does not appear. He died in the State of Missouri, in the fall of 1826. A few days after his death, the court of probate of the county of Jefferson, in that State, granted administration *ad colligendum* to one Michael Taney, who was a partner, who entered into bond in that character. A few days after this, administration on the estate was granted by the same court of probate to Taney, who gave the usual administrator's bond, and was duly qualified. A list of the property was made by appraisers, including 18 slaves, and duly returned to the court of probate. On the 2d October, 1826, an additional appraised inventory was returned, consisting of two more negroes. And on the 3d October there was a sale of a portion of the personal property. Afterwards, on the 8th October, the widow of the deceased, residing in Franklin county, Tennessee, gave to William Keaton, a power of attorney, under seal, to attend to her interests in Missouri; and on the 23d of that month, he applied to the probate court of Jefferson county, in that State, for administration of John Keaton's estate, "in virtue of his being of kin to said deceased, and, also, because he was a creditor of the estate of the deceased," and before its determination, the county court of Franklin county, in the State of Tennessee, on the 27th November, 1826, granted administration on the estate of John Keaton, to the same William Keaton, who entered into bond, with the defendants as his security. And such proceedings were had in the case before the probate court in Missouri, that on the 15th of March, 1827, the letters of administration to Taney were revoked, and letters of administration *de bonis non*, were granted to Keaton, on his giving surety, which he did, and was qualified. Keaton afterwards brought the slaves to Tennessee, hired them out for a year or two, made return of their hire to the county court of Franklin; sold them all at length, or pretended to do so, became the purchaser of most of them himself, returned the amount in the account of the sales to the county court, and finally, with the negroes, removed to the State of Missouri.

The distributees of John Keaton, file this bill against Campbell and Bradford, the sureties in the Tennessee bond, for the value of these negroes. And whether, under the circumstances stated, they

[Keaton's distributees vs. Campbell, et als.]

are liable, is the question before the court. This question has been argued, on both sides, with much learning and ability. It is one of the first impression among us; and feeling, sensibly, its magnitude and importance, we have bestowed upon it, an attentive and anxious consideration. The people of the United States, constituting one integral government for some purposes, are yet, for other purposes, a community of nations, so to speak, essentially distinct, and even foreign from each other. In this latter relation, they exist as to the comprehensive and highly important interests, founded upon the distribution of personal estate; while, at the same time, the internal commerce, social intercourse, frequent changes, and multiplications of domicil, and all the varied and widely ramified relations and connexions of a prosperous, enterprising and homogeneous people, create rights and interests, as to personal property, seldom to be limited, in the case of any individual of ordinary wealth, to the single State in which he may at the time reside. This state of things, while it calls upon the judicial tribunals of all the States for the reciprocal exercise of a liberal comity, admonishes us, to approach with caution, and touch with delicacy, such a question as that, which the record presents. The case before us, in allegation and proof, was obviously prepared, upon both sides, upon the supposition, that the decree to be given would turn upon the question of domicil, and as a consequence of that, upon the question, as to which administration was principal, and which ancillary, and the argument has proceeded, but in a much slighter degree, upon the same ground. For the Missouri administration, it has been said, there lived, and, for nearly two years had lived the intestate; there he died, there were his slaves, constituting by far the greater portion of his property; and there too, was the first administration in point of time. As to the Tennessee administration, it has been said, here had long been his home, here remained his family, and his household furniture and effects. The pretensions of each are plausible, and not unequally balanced. The domicil, in the absence of any proof as to the *animus* of the intestate, and as presented in the record, was probably in Franklin county in this State. But, under all the circumstances shown in this case, it may be said, that if ever there were two administrations, in different jurisdictions, entirely distinct and independent of each other, they are the administrations stated upon this record.

[Keaton's distributees, *vs.* Campbell, et als.]

Upon the subject of principal and ancillary administrations, Justice Story, in his very able and elaborate judgment in the case of *Harvey vs. Richards*, 1 Mason's Rep. 415, says, "I have no objection to the use of the terms principal and ancillary, as indicating a distinction in fact as to the object of the different administrations; but we should guard ourselves against the conclusion, that, therefore, there is a distinction in law as to the right of parties. There is no magic in words. Each of these administrations may be properly considered as a principal one, with reference to the limits of its exclusive authority, and each might, under circumstances, justly be deemed an ancillary administration. If the bulk of the property, and all the heirs and legatees and creditors were here, and the foreign administration were to receive a few inconsiderable claims, that would most correctly be denominated a mere ancillary administration for the beneficial use of the parties here, although the domicil of the testator were abroad. The converse case, would, of course, produce an opposite result. But I am yet to learn what possible difference it can make in the rights of the parties before the court, whether the administration be a principal or an ancillary administration. They must stand upon the authority of the law to administer ordinary relief, under all the circumstances of their case, and not upon a mere technical distinction of very recent origin."

This is said, in a case, too, where the American administration was, in point of form, as well as in object, ancillary; for the domicil was at Calcutta, and a will and executors there existed, and the administration with the will annexed was taken at their instance; but certain of the distributees residing in this country, the administrator was ordered to account and distribute here, not to transmit the surplus to the executors at the domicil. It is said elsewhere, by Justice Story, that whatever may be the form of administration in different countries upon the same estate, they are distinct and independent, because of the distinct and independent source from which they are derived, the power and jurisdiction which grants them, and to which they are accountable. In the case before us, however, the administrators were distinct and independent of each other in point of form, as well as in point of fact, and of legal liability. The administrator in each State, although not at first identical, became so, indeed, in the course of events.

[Keaton's distributees vs. Campbell, et als.]

But we apprehend, that circumstance can operate nothing as to the liability of defendants, Campbell and Bradford, the Tennessee sureties in the administration bond. Their liability under the operation of that circumstance is the same, not greater than if Taney had continued administrator in Missouri, and these specific chattels, the slaves, subject to the Missouri administration, and upon which that had attached, had subsequently been brought by William Keaton into Tennessee, and treated as assets by virtue of his Tennessee administration. In what situation would they have been in that case? That question is answered by the case of *Currie, adm'r, vs. Bircham*, 1 Dow. & Ry. 32: where Bircham had money in his hands in England, the proceeds of effects, which had been in the hands of the administratrix in India, was sued by the English administrator on the same estate: It was held, that the action would not lie; but that the foreign administrator, although of course, not in general entitled to sue in that character, could sue upon her own legal title. The same principle is recognised in the case of *Embray vs. Millar*, 1 Alex. Mar. Rep. 304: 4 Littel, 277: 5 Monroe, 47: Story's Confl. of Laws, 516-17-18-22. If then, in the case supposed, of Taney continuing administrator in Missouri, Keaton the Tennessee administrator, had brought the negroes within this jurisdiction, the Missouri administrator could not in that character, indeed, but in his own legal title as trustee, have maintained here the action of detinue, or according to the course of our court of chancery with regard to property of that description, a detinue bill, as it has been called, and have recovered the possession of the negroes, and removed them to Missouri. But Keaton brought them here, they being assets in Missouri, and the administration granted by that jurisdiction having attached to, and appropriated them to be accounted for, in a course of administration there; he brought them here, and they were in his hands here, not indeed, in his character of Missouri administrator, but in his own legal right, and as trustee; under such circumstances, will the court here, permit him, in violation of his duty of administrator in Missouri, to convert these slaves into assets in Tennessee, so as to fix the sureties here with responsibility? This ought not to be done. 1st. In comity to the State of Missouri. 2nd. In justice to the sureties here; for an account of the faithful administration of these very slaves in Missouri were the several bonds with

[Keaton's distributees vs. Campbell, et als.]

sureties mainly given in that State; and when in Tennessee or elsewhere, Keaton sold, or pretended to sell to himself the slaves in question, he violated his Missouri bond, and would, and could, and ought, there to be held responsible. The case to which we have already referred, in *1 Mason*, establishes, that he could there be held to account, either to distributees or creditors, even if that had been in fact, in object, and in form, as it was not, an ancillary administration. But as it was distinct and independent, there was no more ground, or reason, for their throwing upon the Tennessee sureties the Missouri assets, than for throwing upon the Missouri sureties the Tennessee assets; and if that can be done, in either case, then, if there were twenty-six distinct and independent administrations in this confederacy by one, or many administrators, upon the same estate, it would be within the legal competency of the several principals and their sureties, by concentrating the assets upon one point, to throw the entire responsibilities upon one set of sureties; and this too, without furnishing the sufferers, ultimately, any chance for contribution, seeing that the transactions are distinct and independent.

But it is said, that the defendants, the sureties, should be held liable in this case, because it is an acknowledged principle that the voluntary payment of a debt to a foreign administration, will discharge the debtor. And because goods employed in commerce, and *in transitu*, a ship, &c., to the domicil, at the time of the death, although in a foreign port at the moment of that event, may properly be disposed of under the domestic administration. These cases stand upon their own grounds, and are very distinct from the present. The latter case of the transit of goods is placed by Mr. Justice Story in his *Conflict of Laws*, upon grounds of strong public convenience, and indeed of unavoidable necessity, founded upon the nature of commerce, the ignorance of the death, &c., and the temporary interest of others in freight, &c.

Again: It has been said, that it has been not unusual for a foreign administration to be granted, where specific chattels have existed, but that the domestic administration often, in such cases, brings them home, and disposes of them in the course of the domestic administration. We have not that case before us, and, therefore, do not feel called on to say, that the sureties of the administrator would not be bound. We decide the case, before us, and

[Keaton's distributees *vs.* Campbell, et als.]

that only: that where a distinct and independent administration has been granted in the jurisdiction of the *situs* of the chattels or effects, and such jurisdiction has attached to them, they cannot then be brought into the administration here, so as to subject the surety. Again: It is said that the surplus is transmissible from the foreign administration. Yes; unquestionably, it is so ruled in many cases. But this means, where a suit in chancery has been brought at the instance of the proper persons, the condition of the estate at home and abroad enquired into and ascertained, creditors and distributees and others having been duly notified, and their claims satisfied, or waived, the court may transmit, by its act and order, such surplus, and all persons within their jurisdiction would, of course, be indemnified. Whether they would order it to be transmitted to the administrator himself, or to some judicial forum, where the parties in interest were accounting, and if to the former, whether it would subject his sureties, we care not to speculate.

The case in 5th Mason, relied on, as fixing the liability of the sureties, was a case, where the foreign administration was in its very terms and on the face of it, subordinate, and for the use and benefit of the American executor. But in that case, on other grounds, the sureties were held not to be liable, so that, in fact, there was no decree against him. But see the case of *Hooker vs. Olmstead*, 6 Pickering, 481.

Upon the whole, we are of opinion, that the complainants must seek their remedy against the administrators in the Missouri jurisdiction, where it happened, both he and the property in question, were at the institution of this suit, and that the sureties for the administration here, are not, under the circumstances of this case, liable.

HARRISON, et als, vs. TURBEVILLE, et als.

1. Where the securities of an administrator wish to be released from responsibility, the filing of a petition by such securities and the service of notice on the administrator, are required by the act of 1813, ch. 119, for the benefit of the administrator and not the distributees. The distributees are no parties to the proceeding; and therefore, where the administrator comes in and waives the necessity of such petition and notice, the release of such securities is final and conclusive.

2. Where an administrator procured his bond from the clerk's office and struck out the name of one of the co-obligors and inserted therein the name of another person: Held, that the person whose name was so stricken out was still in equity a party to the bond and bound by all its obligations, and that the erasure did not affect the liability of the co-obligors.

3. A court of chancery will give relief in all cases where the bond has not been satisfied and the obligee is prevented from suing at common law by reason of its being lost or defaced, no matter from what cause, provided it be not by his own misconduct.

4. The act of 1813, ch. 119, authorises the county court to discharge one set of securities from all previous as well as subsequent liability by substituting others in their stead.

William J. Harrison and others, distributees of the estate of William Turbeville, deceased, filed this bill in the chancery court at Franklin on the 12th day of December, 1838, against Miles J. Turbeville, administrator of the estate of W. Turbeville, G. Childress, J. Darden, J. Davis, W. Powel, T. B. Matthews, D. Darden, and J. R. Bartlett, his securities, praying a decree for an account of the estate and for distribution thereof according to law.

It appears that William Turbeville died in the county of Robertson, the place of his residence, in the year 1836, intestate, leaving several sons and daughters, (amongst whom was the defendant Miles J.) and a considerable personal estate. Letters of administration were granted in 1836 to Miles J. by the county court of Robertson. He gave bond according to law for the faithful performance of his duty as administrator, with G. Childress, J. Darden and J. Davis as his securities. In May, 1836, he sold off the personal property, amounting in all to about the sum of \$4500, discharged some of the debts, and paid portions of the distributive shares to several of those entitled.

The administrator embarked in merchandise, and the securities being apprehensive for their safety applied to him to have themselves discharged. He was willing that this should be done, and accor-

[Harrison, et als. vs. Turbeville, et als.]

dingly the administrator and the securities appeared in the county court, in July, 1836, without the formality of a petition filed or notice served, and demanded of the court an order discharging the securities. Thereupon the county court made an order in the following words:

“Ordered by the court, that Jesse Davis, George Childress and James Darden, former securities of Miles J. Turbeville, administrator of William Turbeville, deceased, be released, and thereupon came forward in lieu of said securities, M. Powell, T. B. Matthews, David Darden and J. R. Bartlett, and entered into bond as the securities of said Turbeville.”

This bond was made out and signed by the new securities according to law and in the exact form of the first bond. Subsequently, to wit, in November following, David Darden became dissatisfied with his situation and desired to be released. Thereupon Turbeville went to the clerk's office, got the bond, and without the consent or knowledge of the clerk erased the name of D. Darden, and in the room thereof, one Miles Kirby, his partner in merchandise, signed his name as security. The bond was in that condition returned to the clerk of the county court.

Turbeville and Kirby failed in business. Turbeville wasted the estate, failed to make any final settlement with the distributees and left the State. The cause came on for final hearing at the October term, 1840, at Gallatin, on the bill, answer, replications, exhibits and proof, B. L. Ridley, chancellor, presiding. He dismissed the bill as to the first set of securities, but adjudged the second set liable to the demands of the distributees, and accordingly ordered an account to be taken of the estate and the share of each distributee ascertained, and that the clerk and master report, &c. The complainants appealed from so much of said decree as discharged the first set of securities, and the defendants who entered into the second bond also appealed to the supreme court.

Cook, for complainants. We contend both set of securities are responsible. The first, because they did not pursue the act of 1813, by filing a petition, and this act being in derogation of common right must be strictly construed; and an appearance of Miles J. Turbeville without petition will not dispense with that step.

2. We contend the proof clearly shows the bond was not blank, but regularly filled up when it was signed. Shelby and Hutchison

[Harrison, et als. vs. Turbeville, et als.]

prove this. The bond then is a good common law bond and obligatory. Com. Dig. Tit. Fait, (A. 3) Mass. Rep. 450: 9 Mass. Rep. 308: 13 John. Rep. 285: 1 John. Cas. 250: *Goodrich vs. Walker*; 12 John. Rep. 550; *Verplank vs. Sterry*; Perkins, Fait, 137.

The proof shows that the erasure of Darden's name was made by Miles J. Turbeville, one of the co-obligors and without the knowledge of complainants, and Miles Kirby voluntarily and knowingly signed his name to said bond. This erasure by a co-obligor will not vitiate the bond. If it had been done by a stranger it would not have destroyed the legal effect of the bond. Much absurdity on this subject may be found in the old books, such as that if the seal is torn off by accident or eaten by mice, the bond is vitiated. This, it is admitted, is not the modern law.

The destruction by a despoiler does not render the bond invalid, but it may be sued on at law without *profert*. 15 John. Rep. 297: 6 East Rep. 309: 4 T. Rep. 339: 3 T. Rep. 151, 153, note, *Read vs. Brookman*; *Reese vs. Overbaugh*, 6 Cow. Rep. 746: Palmer, 403: Com. Dig. Tit. Fait, (F. 2) note X. But if invalid at law, a court of equity will set it up. But it is submitted that the doctrine is inapplicable to official bonds where the obligor is not intrusted with the custody of the bond, and where the office is open to all, and any bond might at any time be destroyed by a despoiler, &c.

If a party having the custody of a bond suffers it to be so far erased as that it would be impossible to find out what the old bond was, it would be a just punishment on him, the obligee, to hold the bond void. But this will not apply to office bonds where the obligee has no means of preserving the bond. But no authority has ever gone so far as to hold that an erasure by the obligor himself of one of two or more co-obligors renders the bond void. 11 Coke, 24: Com. Dig. Tit. Fait. (F. 1) note X.

Meigs, for the first set of securities, contended that they were discharged from all liability incurred previous to the execution of their bond or subsequent thereto, and cited 5th J. J. Marshall, 606: 1st Morehead and Brown's digest, 664, 770.

James Campbell, for securities in second bond. Are the second set of securities liable at all, the bond having been altered after it was executed? See 5th Dane's Ab. ch. 144, art. 8, sec. 8: Whelp-

[Harrison, et als. vs. Turbeville, et als.]

dale's case, 5 Coke, p. 119: 1 B. & C. 682: 3 D. & R. 104: Pigot's case, 11 Coke, p. 27: 5 Coke p. 44.

2. If liable at all, what is the extent of their liability? Are they liable for any property which came to the hands of the administrator, and was received and converted by him before the execution of the second bond, and for which the first set of securities were and are responsible? It is not controverted but that a bond for counter-security, might be so framed as to operate, not merely as a security for assets not covered by the first bond, but also for the assets already administered. But that is not done here. The second bond is in the usual form, and binds the administrator to administer the assets not received and converted. 1 Williams on Ex'rs, 594, *et seq.* and the authorities there cited. 2nd Raym. 1215, *Wallis vs. Lewis*: 5 Rand. Rep. 51, *Coleman's Ad'r vs. Munds*: Bac. Abr. vol. 3, Tit. Exr's, B. 2.

TURLEY, J. delivered the opinion of the court.

Miles J. Turbeville, one of the defendants, was appointed administrator of the estate of his deceased father, by the county court of Robertson county, in February, 1836, and entered into bond with George Childress, James Darden and Jesse Davis, as his securities for his faithful performance of the trust. These securities having become apprehensive of loss, Turbeville at their request, at the July term of the county court of Robertson county, executed a new bond, with M. Powell, Thos. B. Matthews, David Darden and R. Bartlett, as his securities, and the first bond was cancelled, and an order made by the court discharging the securities from any liability thereon. In November afterwards, David Darden, one of the new securities, became dissatisfied, and Turbeville with a view to his release, got the bond from the clerk of the county court, erased his name from it, and procured one Miles Kirby to sign it in his stead. Upon this state of facts several questions are made. 1st. It is contended by the distributees of the estate, that the first set of securities were not released, because there was no petition filed against the administrator by them according to the provisions of the act of 1813, ch. 119, and that, in as much as it was a proceeding *ex parte*, the requirements of the statute ought to have been strictly complied with. To this, we answer, that the

[Harrison, et als. vs. Turbeville, et als.]

statute requires the petition and service of notice, for the benefit of the administrator and not of the distributees. The power of granting letters of administration is delegated to the county court, and it is always to be presumed, that they will not neglect a correct performance of their duty, by failing to require good and ample security from the administrator. The distributees have nothing to do with it, are no parties to the proceeding, and the county court have as much power under the act of 1813, to change the securities without their knowledge or consent as it had to take them. Then the statute only requiring a petition for the purpose of giving notice to the administrator, if he choose to come in without notice, as he did in this case, no one has a right to except thereto.

2. It is contended, that the second set of securities are not responsible, because the bond which they executed, having been altered by the erasure of the name of David Darden, is void, and no relief can be had upon it either in law or equity. We do not consider it necessary to enter into an investigation of the common law learning upon this subject; to its refinements we are principally indebted for the existence of the chancery courts, and its stubborn adherence to forms has been constantly aiding and increasing the jurisdiction of its sister tribunal. The fact, that this bond could not have been sued upon at common law, is the very thing upon which the jurisdiction of a court of chancery on this subject rests. It is not denied, that a court of chancery can give relief in all cases, where the bond has been lost, or where it has been defaced by fraud or accident; but it is said, the bond is not lost, it has not been defaced by fraud, for the person who did it, believed he had the power; that it has not been defaced by accident but by design, and therefore it does not fall within the principle which gives a court of chancery jurisdiction. This argument is too refined. The principle, as we understand it, is, that a court of chancery will give relief in all cases, where the bond has not been satisfied and the obligee is prevented from suing at common law by reason of its being lost or defaced, no matter from what cause, provided it be not by his own misconduct; that the words fraud and accident cover all erasures or alterations except those made by the obligee himself, or with his knowledge and consent. Then the alteration of this bond having been made, by persons having no authority to do

[Keaton's distributees vs. Campbell, et als.]

so, in a court of chancery it stands as if it had never been done, and David Darden is still a party to it, bound by its obligations.

3d. It is contended, that the second set of securities are only responsible for assets which came to the administrator and were wasted, after the date of the second bond; that the first securities were responsible for all that came to his hands and were wasted before, and that the county court has no power to discharge them. This, we are of opinion, is too restricted a construction of the powers granted to the county court by the statute of 1813. We think that it was intended, that the court should have power to discharge one set of securities from previous as well as subsequent liability, by substituting others in their stead, who shall be bound as if they had been the first. No harm can be done by this, the security is taken for the benefit of the creditors and distributees, and if the court does its duty, they can be as well protected by the second securities as the first. The court is as competent to take good security in the second instance as in the first, and the presumption is, that it will do so. The second securities have no right to complain, they signed the bond with the knowledge that the first were seeking their discharge, and agreed to be substituted in their stead. The supreme court of our sister State, Kentucky, have given the same construction to a similar statute, in the cases of *Welborne vs. Commonwealth*, 5 J. J. Marshall, 608, and *Dana*, 514: 1 Morehead and Brown's Digest, 684, 770.

We are, therefore, of opinion, that the first securities are discharged from all liability, and that the second are bound for the *devastavit* of the administrator, to whatever extent it be, if it do not exceed the penalty in the bond. The decree of the chancellor will therefore be affirmed.

CAMPBELL vs. BALDWIN, et al.

1. A vendor is presumed to intend to retain his lien upon conveyed real estate for the purchase-money, and the circumstances which manifest the non-existence of such intention must be shown by the vendee.

2. A note given for the purchase-money with the endorsement of a third person is evidence that the vendor intended to waive and abandon his lien on the estate sold, for the payment of the purchase money. This evidence, however, may be repelled by the vendor.

3. Where a bill was filed to subject real estate to the lien of the vendor, and the deed by which such real estate was conveyed, recited that the vendor had taken notes endorsed by third persons, as a security for the payment of the purchase money: Held, that said bill was not had on demurrer, as the complainant had alledged therein, that it was not his intention in the taking of such endorsed notes, to relinquish his lien.

Joseph L. Campbell filed this bill in the chancery court at Franklin, on the 22d of February, 1840, against Henry Baldwin, jr., and against James Plunket. The bill charges, that complainant on the 2nd day of August, 1838, sold and conveyed to H. Baldwin, jr., the one-fourth part of a lot of ground in the town of Franklin, and the house and machinery thereon, known as "the Franklin cotton factory," and the one-fourth part of a certain other lot of ground in said town, with a two story brick store-house and other buildings thereupon; that for the said interest in said real estate, the said Baldwin agreed to give complainant the sum of \$6000, with interest from the 1st day of January, 1838, payable in one, two and three years; that Baldwin executed to complainant three several bills single, endorsed by Benjamin S. Tappan, in consideration of said land so sold and purchased, the first, with interest added for one year, for \$2120, the second, with interest added for the sum of \$2,240, and the third with interest added for three years, for the sum of \$2,364; that the complainant executed a deed of conveyance of said property to said Baldwin; that said deed set forth and specified a description of each of the bills single by whom drawn and endorsed, and when payable; that these facts were inserted in the face of the deed for the purpose of giving notice to any person who should purchase the same that the purchase money was unpaid, as well as to charge the creditors of said Baldwin with notice of such fact, and to retain his lien upon the land for the payment of the purchase-money, and that such deed of conveyance had been duly registered in the county of Williamson.

The bill further charges, that Baldwin had paid him about three-

[Campbell vs. Baldwin, et als.]

fourths of the first of the bills single above set forth; that complainant had obtained judgment against him for about the sum of five hundred dollars, thereupon remaining; that execution had been issued and was then in the hands of the sheriff of Williamson county; that the second bill single, fell due on the 1st day of January then last past for the sum of \$2,249, and being unpaid the complainant commenced suit upon it in the circuit court of Williamson county against said Baldwin and Tappan; that said writ was returnable to the then next ensuing March term; that the third of said bills single would become due on the 1st day of January, 1841. The bill further charges, that Baldwin was much involved in debt; that many judgments had been obtained against him, and that executions having been issued thereupon, they were levied upon the largest portion of the property of said Baldwin, and that he entertained fears, that before he could obtain judgment upon the bill single for \$2,240 then in suit, and obtain satisfaction of the same by execution, the whole of the estate of said Baldwin would be exhausted by sale for the benefit of judgment creditors, and that he should lose the two last instalments of the purchase money; that Tappan was then a resident of the State of Mississippi, and that it was his opinion that he intended to sell all his property in the State and withdraw the proceeds beyond the jurisdiction of the court, before any judgment could be obtained against him.

The bill further charges, that said Baldwin had sold one-fourth part of the said real estate to one James Plunket, and that Plunket had full notice that the purchase-money had not been discharged, but that he did not know the exact nature of the contract, and prayed a discovery in regard thereto.

The bill further charges, that complainant was informed and believed that said Baldwin was about to sell or mortgage said real estate to pay or secure certain debts against him and that he was advised that if said Baldwin should sell or mortgage said property there might be some difficulty in enforcing his lien thereon against such vendee or mortgagee, unless he could show that the vendee or mortgagee had express notice of such lien, and that the filing of this bill would furnish such express notice.

The bill further charges, that complainant would not have taken the said bills single of said Baldwin with the said Tappan as endorser thereupon for the purchase-money of said property, if he

[Campbell vs. Baldwin, et als.]

had not been advised and believed, as he now insists, that he had a lien upon said property for said purchase money, and that the face of the deed would give notice to all the world of his lien upon the property for the unpaid purchase money.

The bill prays, that Baldwin and Plunket be made defendants to the bill, and that the real estate be declared subject to the payment of the purchase money, and that so much be sold as would discharge the judgment already obtained on the first bill single and the second due 1st Janury, 1840, and that it may be declared subject to the satisfaction of the third instalment due 1st January, 1841, in the hands of Baldwin and all others deriving claim thereto from him. The bill also prayed an injunction against Baldwin to restrain him from selling or mortgaging the property. This bill was verified by the affidavit of complainant, and Chancellor Williams ordered an injunction in pursuance of the prayer of the bill.

On the 16th of April, 1840, complainant filed a supplemental bill, charging that since the filing of the original bill he had procured the execution on the judgment obtained on the first bill single, to be levied upon the real estate sold by him to Baldwin, and that M. Baldwin, the wife of Henry Baldwin, had filed her bill, and obtained an injunction against the sale of the property to satisfy complainant's debt, upon the ground that by a certain marriage contract between herself and the said Henry Baldwin, she held a separate estate, and that the property levied on was purchased with the proceeds of her separate estate. This supplemental bill charged, that about \$4,500 of the purchase money was unpaid, and prayed that Mary Baldwin be made a party, &c.

On the 14th day of May, 1840, H. Baldwin, James Plunket and Mary Baldwin filed their demurrer to the bill, and for cause of demurrer set forth, that he, complainant, had admitted and acknowledged by his bill, certain facts, to wit, that for the purchase money of the property sold by him to defendant Baldwin, and which was the subject of this suit, he, the said complainant, received the bills single of said Baldwin, endorsed by Benjamin S. Tappan, which facts, by the known rules of law, avoided his right to an answer. The plaintiff joined in demurrer. It was set down for argument at the May term, 1840, and was argued by counsel before Chancellor Bramlett, who sustained the demurrer and dismissed the bill. The complainant appealed to the supreme court.

[Campbell *vs.* Baldwin, et al.]

J. Campbell. Did the complainant retain a lien on the property sold for the whole of the purchase money? or did he by taking the note with Tappan as endorser part with his lien, when he specified on the face of his deed, that he sold the property for \$6000, to be paid in one, two and three years from and after the 1st day of January, 1838, and for which he had executed his notes with Tappan as endorser?

What is the effect of this recital in the deed? that the consideration was unpaid, or in other words, that the notes with an endorser were not accepted as a payment of the consideration money. The general principle is laid down in 4th Kent, 145. Taking the responsibility of a third person, "is evidence," says Chancellor Kent, "that the seller did not repose upon the lien, but upon the independent security." If taking the security be evidence that the lien is waived, the recitation in the face of the deed that the consideration is unpaid, is surely much stronger evidence to show that the vendor has not parted with his lien, or relied upon the note alone for payment.

The lien is raised or waived by the supposed intention of the parties. *Eskridge vs. McClure*, 2nd Yer. Rep. 85. Whether the taking a security is a waiver of the lien depends upon the circumstances of each case. Sug. Ven. 387, 8, 9, 90, 1, 2. *Mackreth vs. Symmons*, 15th Ves. 329. A lien may exist notwithstanding a mortgage. It exists unless there is a manifest intention to abandon it. It must be shown that the vendor did not mean to trust to the estate sold. 1st J. C. R. 309, *Garson vs. Green*. Can it be said here that C. did not mean to trust to the estate sold as a security? In other words, that he had given up the land and taken the note as a payment.

The lien rests upon this single principle, that the land is bound till it is paid for, or security is given, that the vendor considers equivalent to a payment. How can it be said here that the land is paid for, or its equivalent received, when it is expressly stated in the face of the deed that it is not paid for?

Taking a distinct security is *prima facie* evidence that the lien is waived. It may be repelled by circumstances showing it is not waived. *Hatcher vs. Hatcher*, 1st Ran. 53. In a deed where property is conveyed to one, but paid for by another, a trust arises in favor of that other. So if a conveyance is made, without consideration, to a trustee, a trust results in favor of the bargainor. It is

[Campbell vs. Baldwin, et al.]

upon this principle that the doctrine of an equitable lien arises. Here the conveyance has been made, but the deed shows that the consideration is unpaid; a trust then arises in favor of the bargainor till the consideration be paid. 2d Story's Eq. 470, 476.

2. Complainant obtained judgment upon the first note which gave him a lien if he had none before. He had the right to file his bill to enforce that lien. In any event therefore the chancellor's decree must be reversed.

Meigs, for defendants. The bill in this case is filed to set up the vendor's lien for purchase-money, and it makes out a case of a conveyance to the purchaser, whose promissory notes or negotiable paper the vendor took for the purchase money, endorsed by a third person. And the question is, whether the vendor's lien for the purchase-money is, or is not extinguished by such independent security? In the affirmative, see *Eskridge vs. McClure*, 2 Yer. 84; *Gibman vs. Brown*, 1 Mason, 191, same case, 4 Wheaton, 255, and 4 Peters' Cond. R. 445; and 2 Story's Eq. sec. 1226, and note at the end of the section.

The vendor's lien for purchase-money of things sold and delivered seems to be founded upon this principle of the civil law, stated in Justinian's Institutes, Lib. 2, Tit. 1, sec. 41, "Things, although sold and delivered, are not acquired by the buyer until he hath either paid or otherwise satisfied the seller for them, as by a bondsman or pledge." Hence it is laid down by Pothier in his treatise on the contract of sale that, "it is peculiar to the delivery, which is made in execution of the contract of sale, that it does not transfer the property to the buyer, except when the seller has been paid or satisfied the price." And this, though it be held in that law, as well as in our own, that when the contract of sale is of a specific thing, and is absolute, it is considered to be perfect as soon as the parties are agreed upon the price for which the thing is sold. Pothier No. 309; Meigs' Rep. 26, 27. It is manifest enough, that the seller, who sells for ready money, is considered not to have an intention to transfer the property, except upon that condition and therefore that a delivery in such case does not transfer the property. Pothier, No. 323. But the principle just cited from Justinian is much broader; for it embraces not only sales for ready money, but also sales on time, as to which latter, it is said that things although sold and delivered, are not acquired by the buyer

[Campbell vs. Baldwin, et als.]

until he has satisfied the seller for them, as by a bondsman or pledge, that is, some collateral and independent security. According to this, the buyer would not acquire the thing, though sold and delivered, by giving the seller his own bond; he must give a bondsman or pledge, either of which is looked upon as a satisfaction of the price. It is not the sale and delivery, but the satisfaction of the price, either by payment or security, which extinguishes the seller's title. It is because the contract of sale is a commutation-contract, in which the intention of each of the parties is to receive as much as he gives, (Poth. No. 2,) that the property in the thing sold and delivered never wholly passes out of the seller, and is acquired by the buyer, until the equivalent, the price, is either paid or secured by some assurance besides, or in addition to, the buyer's promise or bond. As to the application of the principles of the contract, the civil law admits of no distinction, as the common law does, founded on the nature of the property. These principles apply by the former system, alike both to movables and immovables. But at common law the whole property in movables sold on time, passes, without fraud, to the buyer so soon as the parties are agreed upon the price. Not so as to immovables, for as to them both systems agree that the property is not wholly acquired by the buyer, even by a sale and delivery of possession, but only by the price, or the security of it by a bondsman or pledge. Without these or one of them, the property itself is tacitly pledged for the price; while with them, or one of them, the property wholly passes to, or is acquired by the buyer. The existence of this tacit pledge or lien for purchase-money unpaid, or not otherwise secured, is exactly consistent with the principles of the contract, and makes the law symmetrical and harmonious.

DCampbell, for complainant. The decision of the chancellor upon the demurrer is conceived to have been founded in a total misapprehension of the case. It would seem that he inferred, from a hasty reading of the bill at the bar, that the question presented by it & decision was, whether the acceptance by the vendor of the notes of the vendee for the purchase money, with the endorsement of a third person on them, constituted a waiver of the implied lien, which the law would ordinarily have given him upon the estate sold for such purchase money. But it will be apparent upon a careful perusal of the bill that such is not the case which is

[Campbell vs. Baldwin, et als.]

made by it. The bill alledges, that the mode in which the purchase money for the property was secured to be paid, was inserted in the conveyance given for it, in order to retain the lien of the vendor thereupon, and to give notice of the retention thereof to subsequent purchasers from the vendee; and that the vendor looked to the property as his ultimate security for the payment of his purchase-money, and would not have conveyed it to the vendee alone upon the security of his notes with the endorsement of a third person on them. These allegations obviously present for decision a case wholly and entirely different from the one, in which it appears the vendor has taken the notes of the vendee for the purchase-money with the endorsement of a third person on them, without anything more. This latter state of facts would raise the isolated question, whether such notes with the endorsement of a third person on them, would, in the absence of any thing more, furnish conclusive evidence that the vendor had waived his lien upon the estate conveyed; but the former state of facts presents the question, whether it be not competent for the vendor to take collateral security of this description for his purchase money from the vendee and still retain his lien upon the estate conveyed, by the insertion, in the conveyance, of the mode in which such purchase money is secured to be paid, (if such be the intention of the parties,) and whether, when the bill is demurred to, and the intention of the vendor to retain his lien, as therein alledged, thus admitted by the vendee, such lien must not be held to exist. To hold that such is not the correct rule of equity jurisprudence applicable to this state of facts, is to contradict the whole current of authorities, English and American, as well the adjudged cases as the text writers upon this subject. It would, indeed, be absurd to hold the lien was waived, when the vendor alledged in his bill his intention to retain it, and the vendee admitted the fact of the existence of such intention to retain it.

There is no case to be found, either in England or America that gives the slightest countenance to such an absurdity, nor any text writer who yields it the least support. To see that this assertion is well founded, it is only necessary to advert to the terms in which the rule upon the subject of the lien of the vendor is laid down in the best text writers, and to observe how that rule has been applied in some of the adjudged cases. Story, in his Equity Jurisprudence, 2d vol., page 470, states the rule thus: "Generally speaking, the lien of the

[Campbell vs. Baldwin, et als.]

vendor exists, and the burthen of proof is on the purchaser to establish that in the particular case, it has been intentionally displaced or waived by the consent of the parties. If, under all the circumstances, it remains in doubt, then the lien attaches." In another part of the same work, he says: "The taking of a security for the payment of the purchase-money is not of itself, as it was in the Roman law, a positive waiver or extinguishment of the lien." Again the same author says: "But the taking of a security has been deemed, at most, as no more than a presumption under some circumstances of an intentional waiver of the lien, and not as conclusive of the waiver. And if a security is taken for the money, the burthen of the proof has been adjudged to lie on the vendee to show that the vendor agreed to rest on that security and to discharge the land." Chancellor Kent, in the 4th vol. of his Commentaries, page 157, lays down the rule in the same way, and in terms almost as strong. "*Prima facie*," says he, "the lien exists without special agreement for that purpose, and it remains with the purchaser to show that from the circumstances of the case it results that the lien was not intended to be reserved, as by the taking of other real or personal security, or where the object of the sale was not money, but some collateral benefit." The same rule is stated by Lord Eldon, in terms still stronger, in the case of *Macreth vs. Symmons*, 15 Ves. 348. "The principle," he there says, "has been carried to this extent, that the lien exists, unless an intention, and a manifest intention, that it shall not exist, appears." These citations may surely suffice to show the nature, extent and limits of the rule in equity, as to the effect of the vendor's taking another security for his purchase money as understood by these distinguished writers. From the whole of them the obvious result is, that whether the lien exists in any particular case, is a question of fact, which is open for discussion upon all the circumstances of the case, and that the acceptance by the vendor of a collateral security for the purchase money is merely evidence of a waiver of lien, which is subject to be repelled by any other evidence that may exist in the case. A review of the cases will show, that the rule as laid down by these distinguished writers, is the correct result of these cases. Thus it was decided in the case of *Macreth vs. Symmons*, which has been before cited, (15 Ves. 328,) that the lien exists unless clearly relinquished, and the having taken and relied upon another security, would be evidence of the waiver, according to the circum-

[Campbell vs. Baldwin, et als.]

stances of the case. There the bill alledged that in the year 1783, Macreth was indebted to John Manners in various sums of money, which amounted altogether to the sum of £13,500, with J. Martindale as his security. Martindale agreed, in 1785, with Macreth to discharge the debt, and they settled their accounts with such agreement. Martindale had, indeed, before that time taken credit for £3,000 of it in a prior settlement between him and Macreth. There were afterwards other settlements between them, and on the last of these settlements, which was made in February, 1792, there was a balance of £54,000 found due Martindale. There was included, however, in that sum, the amount of £10,393 17s. the value of certain annuities granted by Macreth, against which Martindale agreed to indemnify him, in consideration of his agreement to pay it to him. For this purpose a bond for £20,000 was given, and Macreth executed a mortgage in fee simple for the balance of the £54,000 on the 31st of October, 1793. Macreth agreed to sell the reversion in the mortgaged estates to Martindale for the sum of £60,000, composed of the principal and interest due upon the mortgage and conveyed the same to Henry Martindale and his heirs to the use of Macreth for life, and remainder to John Martindale in fee. It further appeared that Martindale failed to pay the bonds for £13,500 to Manners and the value of the annuities, which constituted part of the consideration for the purchase of the reversion of the mortgaged estate. Martindale, in 1797, became bankrupt, and the representatives of Manners proved the debt due on the bonds under the commission issued against him and received dividends, and Macreth was compelled to pay the balance due upon those bonds, which amounted to the sum of £14,128 3s. and also various sums on account of the annuities. Before his bankruptcy, Martindale had contracted to mortgage the reversion of the estate comprised in the indentures of 1793, to Symmons, who filed a bill against his assignees and obtained a decree for a mortgage. But Macreth was not a party to that suit, and the decree was made with an express reservation of his rights. Macreth claimed a lien upon the estate for the payments he had been compelled to make by the failure of Martindale to perform his engagements, and gave the assignee notice of his claims. The Lord Chancellor Eldon decided that as to the annuities, Macreth had no lien upon the estates, but that as to the amount he was compelled to pay on account of the bonds to Manners, which Martindale had failed to discharge

[Campbell vs. Baldwin, et als.]

according to his contract, he had a lien upon the estates for the payment of the same.

The precise point involved in the present case would seem to have been settled in the case of *Brabane vs. Haskins*, 3 Price, 31. There a "bill was brought founded upon an equitable lien for the purchase-money of an estate, and the bill stated that a bond was taken as a further and additional security; a demurrer to the bill upon the ground that the taking the bond was a waiver of the lien, was overruled, for the allegation of the bill was that it was taken as an additional security, and if it was not, the objection should be in another form." Story's Equity Pld. That was a much stronger case for the implication of a waiver of the lien than the present. The facts there, were, that Brabane had entered into an agreement with one Joseph Dickens, for the absolute conveyance of an estate, (which was carried into execution by a conveyance of it,) and it was agreed that Dickens should be allowed time for the payment of four thousand pounds, part of the purchase money, and should, "for the further securing the payment of it," procure Richard Meek to join him in a joint and several bond in the final sum of eight thousand pounds. Upon these authorities this case might be safely rested. They establish beyond controversy, that the existence of the lien in any case is purely a question of fact, and that the having taken a collateral security for the purchase money is merely evidence of the waiver of the lien, and is open to contradiction like all other evidence.

A review of all the adjudged cases in England and America, will show that the result of them sustains this position. 2 Story's Eq. Jur. 475: *Fawell vs. Heelis*, Ambler, 724: *Bond vs. Kent*, 2 Vern. 281; *Nourse vs. Brown*, 6 Ves. 759: *Hughes vs. Kearny*, 1 Sc. & Lefr., 135-6: *Saunders vs. Leslie*, 2 B. & Beat. 514-15: 3 Russ. 488: S. C. 1 Sim. & Stew. 434: *Grant vs. Mills*, 2 Ves. & Beam. 366: *Coffer vs. Spottiswood*, Tomlyn's Rep. 21: *Gilman vs. Brown*, 1 Mason Rep. 212: *Garson vs. Green*, 1 John. Chan. Rep. 308: *Blackburn vs. Grigson*, 1 Brown Ch. Rep. 420: *Coppin vs. Coppin*, 2 P. Wms. 291: *Cole vs. Scott*, 2 Wash. Rep. 141: *Fish vs. Rowland*, 1 Paige, 20: 9 Cowen 316: 3 Bibb, 183: *Hatcher vs. Hatcher*, 1 Rand. 53: 8 American Com. Law cases, 297: *Meigs vs. D.*, 6 Conn. 456: *Little & Tilford vs. Brown*, Leigh, 353: *Gann vs. Chester*, 6 Yer. 265.

[The State vs. Allen.]

REASE, J. delivered the opinion of the court.

The result of all the decided cases, and of all the elementary disquisitions, which the counsel of the complainant has, with much labor and learning, laid before us, is, so far as they have any bearing upon the question raised by the demurrer, that in the first place a vendor is presumed to intend to retain his lien upon the conveyed premises for the payment of the purchase-money, and the circumstances to manifest the non-existence of such intention, must be shown by the vendee; and, truly, that a note given for the purchase-money, with the endorsement of a third person, is *evidence* that the lien of the vendor is waived and abandoned.

But we regard it as evidence only, which may be repelled on the part of the vendor. We do not think, however, that the recital in the deed, to which the draughtsman of the bill seems to have attached so much importance, will have that effect; for if it proclaims to all who may read the deed, that the consideration-money has not been paid, it informs them, also, that a security has been taken therefor. But as the plaintiff in his bill avers, that, notwithstanding such security, it was his purpose and intention to retain his lien, (which purpose and intention, if he have competent proof thereof, we think he may show upon the trial,) we are of opinion that the defendants should answer. We regret to be constrained so to rule in the case, because we think it very probable, and almost certain, that the chancellor, upon the trial of the cause, will arrive at the same result to which he came on the argument of the demurrer.

THE STATE vs. ALLEN.

The Governor of the State of Tennessee, on the demand of the Governor of Alabama, surrendered the body of Allen, who had been previously arrested for murder in the State of Tennessee and bound over, and who was on bail at the time of the demand made: Held,

1. That it was not the imperative duty of the Governor of the State of Tennessee to have surrendered him until he was legally discharged from the operation of the laws of Tennessee.

2. That having, however, delivered him over to the constituted authorities of Alabama, such act discharged the bail from his recognizance.

E. S. Hall, a justice of the peace for Davidson county, issued a State's warrant on the 15th day of December, 1838, against Jesse J. Allen, for the murder of John Cooper, in the county of Cannon,

[The State vs. Allen.]

on the 30th day of January, 1838. Allen was arrested in Davidson county by a constable, and confined in the jail of said county on the 15th of the same month. Afterwards Ralph Martin, and W. H. Allen, the defendant in this case, entered into a recognizance before Hall, in the sum of two thousand dollars, for the appearance of Jesse J. Allen, before the circuit court of Cannon county, on the 2d Monday in January, 1839, to answer the State, &c. On the 19th January, 1839, Jesse J. Allen failing to appear, the recognizance was forfeited and judgment *nisi* was taken against the bail, and *scire facias* issued. On the 15th of April this process was served upon Martin; on the 23d on W. H. Allen.

At the May term, 1839, the cause was continued upon the affidavit of Allen, with leave given till the succeeding term for the defendant to plead or demur to the *scire facias*. At the May term, a motion was made to set aside the forfeiture, and the cause continued by consent of parties.

It does not appear upon what grounds this motion was made, as none are set forth in the record, nor does it appear that the court ever acted upon it.

The defendant Allen filed a plea. At what term this plea was filed, does not appear. He alledges in this plea, that Hall, a justice of the peace for Davidson county, committed Jesse J. Allen to the common jail of Davidson county, on a charge of having murdered N. Steele on the 30th of March, 1838, in the county of Marshall, in the State of Alabama, there to remain till demanded by the constituted authorities of Alabama, or discharged by due course of law; that he was demanded by the Governor of Alabama; that on the 11th of January, 1839, he was ordered to be delivered over to the agent of the Governor of Alabama, by the Governor of the State of Tennessee, and that said Allen being, on the 14th day of January, 1839, still in jail, was on that day delivered over to the agent aforesaid, and that on the 19th day of January, the day on which the forfeiture was taken, the said Jesse J. Allen was confined in the common jail of Franklin county, Alabama, so that he could not be delivered, and that he was still in jail.

To this plea there was a demurrer. The demurrer was overruled, and the defendant discharged. Appeal in error by the State to this court.

[The State vs. Allen.]

Attorney General, for the State. The judgment of the circuit court, overruling the demurrer, was erroneous.

1. The murder in the State of Tennessee was perpetrated before that in Alabama. The prisoner was first arrested in this State. He was recognised to appear in Cannon county, according to law, before the demand was made by the Governor of the State of Alabama. He had incurred the responsibility to the laws, and the judiciary department of the government had appropriated the custody of his body. He had been imprisoned in the common jail, and in the contemplation of law was still imprisoned by his bail. By what authority had the Executive the right to violate the right of the bail to the custody of the body of the prisoner? By what authority had he the power to annul a judicial order, open the door of the prison, and defeat the previously attached jurisdiction of this State?

The court below, probably acted upon the idea that the Governor was bound to disregard the laws of the State, as rendered inoperative in this case by the 2nd section of the 4th article of the constitution of the United States, in the following words: "A person charged in any State with treason, felony or other crime, who shall flee from justice, and be found in another State, shall on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime." This clause of the constitution of the United States should, it is true, be sacredly observed, as it is one of the reciprocal obligations entered into by them for their mutual peace and harmony. But upon what grounds of reason can it be contended, that, where a crime is committed in one of the States by the violation of a law made in conformity with the constitution of the State and of the United States, and the individual committing such crime has been secured according to law, to answer for such offence, and whilst in the custody of the law, incurs a responsibility to the laws of a sister State, the laws of the first State are superseded, and rendered null and void, to give effect to the law of the sister State? There is not a shadow of reason to sustain such a construction of the constitution of the United States. The home jurisdiction had attached before the responsibility to the foreign jurisdiction had been incurred. Can it be contended, that the delay in the delivery of the murderer, till the home jurisdiction had performed its office, either by the discharge of him or by the conviction and execution of

[The State *vs.* Allen.]

him, would have been a denial of the demand of the Governor of Alabama? By no means. If he had been executed, then the utmost object of the laws of Alabama would have been accomplished. If he had been acquitted, before any final release from the operation of the laws here, he could have been surrendered to the authorities of Alabama. Thus the laws of both States would have been carried into effect, and the reciprocal obligations of the States, under the federal constitution, fully and in good faith, complied with. By pursuing the opposite course, a very different state of things results. The constitution provides for the delivery of fugitives from justice. Here the laws of this State are disregarded and defeated, and the prisoner transmitted by the executive authority to the State of Alabama. Under such circumstances, can he be regarded as a fugitive from the criminal justice of Tennessee? He could not. And the Governor of Alabama would have no authority under the constitution to send the prisoner back to Tennessee for trial, in the event of his acquittal, or on the termination of his punishment in Alabama.

The constitution of the United States did not, therefore, *under the circumstances of the case*, authorise the Governor of this State to disregard the laws of Tennessee. This act was, therefore, illegal and void, and of course furnishes no lawful excuse to the bail for the non-surrender of the prisoner. If the Governor had no legal authority to seize the person of the prisoner in violation of the rights of the bail, then his acts could no more be pleaded in bar of the recognizance, than the acts of a lawless band, who had seized the prisoner, and carried him off with a view to defeat the criminal justice of the State.

2. If, however, the act of the executive be regarded as legal and valid, it by no means follows as a matter of course, that this matter furnished a good plea in absolute discharge of the recognizance. There is no stipulation in the face of the recognizance, that the bail should be discharged upon the contingency which has happened, and the party not having provided for it in his recognizance, it is not good in bar. *Matthews vs. Cook*, 13 Wend. It would unquestionably (in the event the act be legal) furnish matter upon which to set aside the forfeiture and stay the proceedings against the bail on the recognizance, till the body of the criminal could be procured by the bail, or good cause why it was not done, shown on a motion for a discharge of the bail under the act of

[The State vs. Allen.]

1811, ch. 2. In this case the murderer may now be in Tennessee, and within the control of the bail. The imprisonment in Alabama may have been temporary. All the authorities sustain the position, that no temporary suspension of the right of the bail to the custody of the body furnishes matter in absolute discharge of the recognizance; and this is so, though the suspension of his right of control has been created by the authority of the State. An imprisonment for a term of years in a State prison, has not been regarded as a discharge of the recognizance, though the proceedings were stayed till the expiration of the term. See *Lofin vs. Fowler*, 18th Johnson, 335: *Bigelow vs. Johnson*, 16th Mass.: *Parker vs. Chandler*, 8 Mass.: *The People vs. Common Pleas*, 2 Wend. 263. The criminal must, in the language of the authorities, be placed "irrecoverably beyond the control of the bail."

The fact that the criminal was transmitted beyond the limits of the State, cannot alter the rights of the parties. The bail had as much power over him in Alabama as they had in Tennessee. This is on the ground, that the relation of bail and prisoner is founded on contract, is enforced by the comity of States and Nations, and is not based upon jurisdiction. *Nichol vs. Ingersoll*, 7 John. 154: *Commonwealth vs. B.*, 8 Pickering: Petersdorff on B. 220, 290.

3. The rules which regulate the discharge of bail and their responsibilities, are the same in civil and criminal cases. Petersdorff on Bail, 302, 216, *et seq.*

4. It may be urged that the State is a party to this recognizance; that the Governor represents the State in reference to its executive powers, and that representing the State, he has discharged the recognizance by asserting the claim of the State to the body of the prisoner, in opposition to the rights of the bail, and removing the prisoner beyond the limits of the State, contrary to his consent.

To this it is answered, that the executive action was based upon the conduct of principal in the recognizance, that the necessity of executive action (if it was necessary at all at the time and under the circumstances of this case) was created by the misconduct and crime of the principal in the recognizance. If this be regarded as good matter in bar of the recognizance, then defendant is permitted to take advantage of the wrong and crime of the principal in the recognizance, to defeat their own responsibility. The recognition of such a principle, enables the principal in the recognizance to discharge his bail in one State by the commission of crime in ano-

[The State vs. Allen.]

ther, and thus to defeat the attached jurisdiction of one State by transferring himself through the medium of executive action to another.

It is, therefore, contended on the part of the State, that the action of the executive, whether legal or illegal, does not furnish matter in absolute bar of the recognizance. It undoubtedly furnished matter upon which the court would be authorised to set aside the forfeiture and stay the proceedings; and if, after fair and reasonable exertions by the bail to procure the body of the murderer, and a failure so to do, the case would present a proper one for the exercise of the power conferred upon the court by the provisions of the act of 1811, ch. 2, sec. 1: N. & C. 338.

Ewing and Ready, for the defendant.

TUNLEY, J. delivered the opinion of the court.

Defendant became bail for Jesse Allen's appearance at the January term, 1839, of the circuit court of Cannon county. Before the term arrived, the Governor of the State of Alabama demanded the body of Allen from the Governor of the State of Tennessee, as a refugee from justice, and he was delivered up by the order of the Governor of the State of Tennessee, to the authorities of Alabama, in pursuance of this demand. The consequence was, he did not appear at the January term of the circuit court of Cannon county, and judgment was taken against the bail, upon which a *scire facias* was issued, to which he pleads in bar the facts above stated, and that Allen was, at the term appointed for his appearance in court in Cannon county, and still is in prison in the State of Alabama upon a charge of murder, whereby he has been prevented from bringing him into court in discharge of the undertaking. To this plea there is demurrer, which was overruled by the court below, and we think correctly.

By the constitution and laws of the United States, the Governor of Alabama had the right to demand Allen, and the Governor of the State of Tennessee had the power to give him up. Indeed it would have been his imperative duty to have done so, had he not rendered himself, by the commission of crime, amenable to our criminal laws. This would have justified the Governor of Tennessee in detaining him till he had made satisfaction therefor; but he chose not to do so, but to surrender him. This we think he might legally do, and that the act was not one of supererogation. Then,

[Overton's heirs vs. Cannon.]

how stands the case? The defendant has become bound to the State of Tennessee, for the appearance of Allen. The State of Tennessee, by her executive, takes possession of his body and delivers him to a foreign power, where he has ever since been detained for crime committed against that power. The State of Tennessee takes judgment against the defendant, because Allen did not appear, (a thing that had been rendered impossible by the State itself,) and is seeking to make him pay the money. What monstrous injustice!

This case is much stronger than those referred to in argument. Those were cases of bail in civil suits, where the bail asked to be exonerated, in consequence of some act of the Government, by which they had lost the custody of the person for whose appearance they were bound. They were exonerated or not according to the circumstances of the cases; but this is a case of the State of Tennessee seeking to charge bail for not doing what it by its own act has prevented.

The judgment of the circuit court will be affirmed,

OVERTON'S HEIRS vs. N. CANNON.

1. In order to bind a man by a proceSSIONAL survey, an authority from such man to the surveyor to make such survey must be proved, and in the absence of proof the presumption of law is, that it is unauthorised.

2. Where the deputy surveyor and Overton, whose land was about to be surveyed under the act of 1806, disagreed and applied to the principal surveyor for his instructions, and the principal surveyor directed the survey to be completed according to the mode insisted on by the deputy, which mode was illegal, and thereupon Overton abandoned the further prosecution of the survey: Held, 1. That a countermand of survey was not necessary: and, 2d. If it were, a refusal to have any thing more to do with the survey, would in the absence of other proof, be sufficient to establish such countermand.

3. If an individual recognizes and adopts a proceSSIONAL survey as establishing the boundaries of land, this recognition and adoption shall bind him; and this is so, though he may not have accompanied the surveyor and assented to his proceSSIONAL survey at the time.

4. A man shall not be estopped from claiming his just and legal rights by a hasty, ill-advised and momentary recognition or adoption of a line which has been illegally run; and, therefore, the circuit judge erred, when he charged the jury, "that if the defendant recognized or adopted the proceSSIONAL line, it would bind him, although he had recognized it only one day."

This action of ejectment was commenced in the circuit court of Bedford county, on the 19th day of August, 1836, by N. Cannon,

[Overton's heirs vs. Cannon.]

against the heirs of John Overton, for the recovery of the possession of certain lands, lying on both sides of Duck river, in said county. The controversy arose under a grant for 5000 acres, by the State of North Carolina, to J. G. and T. Blount, and the leading facts of it are found reported in Meigs, 216. This supersedes the necessity of more than a very brief statement of the facts upon which the question in this case arose.

After various continuances, it was submitted to a jury of Bedford county, at the August term, 1840, Judge S. Anderson, presiding.

Cannon read to the jury, a grant from the State of Tennessee for six hundred and forty acres, dated 14th June, 1828, by virtue of an entry made on the 15th day of December, 1826, under the provisions of the act of 1823, authorising entries to be made of vacant and unappropriated land, by the payment of 12½ cents per acre, into the treasury of the State, and office fees. This grant covered land in the possession of Overton's heirs. The defendants relied on a grant for 5000 acres to John G. and Thos. Blount, made by the State of North Carolina, in 1793. The Blounts sold and conveyed to Allison; Allison mortgaged to Norton; Norton filed his bill for foreclosure in the federal district court at Nashville.—The land was sold by a decree, A. Jackson became purchaser, and by power of attorney, authorised the conveyance of the land to Overton and Whiteside, &c. This was done in July, 1802.—In May, 1807, Whiteside and Overton, by deed, divided the land between themselves, assigning to each two portions thereof. The grant to the Blounts calls to lie on both sides of the two main forks of Duck river, beginning opposite to the mouth of Wartrace creek at a black-walnut, a plumb tree and hickory, and running west, &c., thence south 894 poles to a stake, *crossing* the river, &c.

If in running the line south, the survey be stopped at the distance of 894 poles, the land in dispute is not within the limits of the grant, but if the line be extended across the river, it is within the limits of the grant.

It appears that, in 1808, John Overton went upon the land with Malcolm Gilchrist, a deputy surveyor, for the purpose of making a proceSSIONAL survey of the tract; that they commenced at the beginning and run the first line to the white oak called for; then, the second, the course and distance, to wit, 894 poles, at which point the surveyor stopped and refused to proceed further: Overton

[Overton's heirs vs. Cannon.]

contending that he should run on to the river in obedience to the express call of the grant, and not being able to agree upon the point they stopped the survey and went to the principal surveyor, William P. Anderson, for instructions: that Anderson directed Gilchrist to stop at the distance of 894 poles called for, and Overton expressed dissatisfaction with this result, and refused to have any thing further to do with the proceSSIONAL survey; that Gilchrist, without his presence or assent, proceeded to proceSSION the land according to course and distance, disregarding the call for the river, and returned the plat and certificate of survey, which were received by the principal surveyor and registered and laid down on the general plan.

If the lines were run as desired by the surveyor, the land claimed by Cannon was vacant and subject to entry at the time he entered it. If run as Overton insisted, it included the land claimed by Cannon and gave Overton and Whiteside, above their 5000 acres, a surplus of about 1800 or 1900 acres.

Overton and Whiteside at a subsequent period had the grant to the Blounts run out according to their construction of its calls, and in 1813 took actual possession of the premises according to such calls, and continued to hold accordingly. The supreme court in the case of *Singleton vs. Whiteside*, (see Meigs, 209,) at the December term, 1838, decided, that the surveyor in his proceSSIONAL survey should have crossed the river, the call to cross the river controlling the less material call for so many poles, and that the surveyor had authority to proceSSION the land of Overton and Whiteside by their consent, and if they, or either of them dissented from the course adopted by the surveyor, it would not bind them or either of them.

In addition to the evidence which was submitted to the jury in the case of *Whiteside vs. Singleton*, and which appears in that case as reported, there was introduced to the jury by the plaintiff some other testimony, documentary and verbal, (not necessary here to be set forth,) for the purpose of showing that Overton acquiesced in the proceSSIONAL survey made by Gilchrist in February, 1808, and that he adopted it, and claimed under and by virtue of it for a considerable length of time, and was therefore bound by it.

The judge presiding, charged the jury substantially as follows: "The grant, No. 235, to John G. and Thos. Blount, which had been read to them, called to run south from the second corner 894 poles

[Overton's heirs vs. Cannon.]

to a stake, crossing Duck river. If that grant never had been surveyed, and we were now fixing its boundaries, the second line would have to run to the south side of Duck river, although three hundred poles or upwards further than called for, and the third line would have to be run east from a point immediately on the south bank of Duck river the distance called for, and thence to the beginning. But it is insisted that John Overton, who owned or claimed to own the one-half of the land granted to the Blounts, procured Malcolm Gilchrist, deputy surveyor of the second district, to procession said land agreeably to the 21st section of the act of 1806, and the surveyor terminated the second line at the end of 894 poles and north of Duck river, and run thence east, thence north to the beginning; that the lines then run were marked, and such survey was binding upon Overton, and he was estopped from claiming beyond the lines there marked. Upon this point the court told the jury, whatever lines were made by Gilchrist, with the consent of Overton, were binding upon him and the State; but if Overton and Gilchrist disputed as to the manner of surveying the land, when they were 894 or 920 poles south from the second corner, and went to the principal surveyor's office to get his instructions, if Overton agreed to leave the determination of the question to the principal surveyor, and to be bound by his decision, and if the principal surveyor decided the question against Overton, and the survey were afterwards made in pursuance of that decision, it would be binding upon Overton, although against his wishes; unless he had countermanded or revoked the authority to Gilchrist before he run and marked the south boundary line. If he had thus agreed to refer the decision to the principal surveyor, he had power to revoke the authority any time before the survey; but if the proof only showed that Overton was dissatisfied and went off expressing dissatisfaction alone, and refusing to return with the surveyor to complete the survey, that would not be a revocation of the authority to Gilchrist. But if he never agreed to abide by the decision of the principal surveyor, the decision of the surveyor, and the survey made in pursuance of that decision, would not bind Overton, if he objected and refused to return to complete the survey. But if after the survey was thus made, Overton, with a knowledge that the south boundary line had been run and marked by Malcolm Gilchrist in his processioning survey, recognised or adopted that south boundary line, it would bind him, although he had only recognised it one day;

[Overton's heirs *vs.* Cannon.]

but for the recognition to have that effect, Overton must not have been under any mistake as to the line he was thus recognizing, to wit, if he ever recognized this processioning south boundary line, if he supposed he was recognizing the extended south boundary line which run east from a point on the south bank of the river, such recognition would not bind him."

The jury rendered a verdict in favor of the plaintiff. The defendants moved the court for a new trial, which was overruled, and defendants appealed in error.

Ready, for Overton's heirs. In this case, exceptions were taken to the charge of the judge below to the jury. In speaking of a supposed agreement between Overton and the surveyor, Gilchrist, to refer a dispute between them about the manner in which the processioning survey was to be made, the judge told the jury, "if he had agreed to refer it (the dispute) to the decision of the principal surveyor, he had power to revoke the authority any time before the survey, (meaning the authority of Gilchrist,) but if the proof only showed that Overton was dissatisfied and went off expressing dissatisfaction alone, and refusing to return with the surveyor to complete the survey, that would not be a revocation of the authority to Gilchrist." In this there was error. The very reverse of the judge's position would be correct, even if it were true Overton had agreed to refer the dispute to the principal surveyor, of which there is no proof. If he had made such agreement, the expression of his dissatisfaction at the decision, his going off, &c., was a revocation of the authority. Moreover, such an agreement was not binding on him, even if it had been in writing.

Again: The judge said to the jury, "if, after the survey was thus made, Overton, with a knowledge that the south boundary line had been run and marked by Malcolm Gilchrist in his processioning survey, recognized or adopted that south boundary line, it would bind him, although he had only recognized it one day; but for the recognition to have that effect, Overton must not have been under any mistake as to the line he was thus recognizing, that is, if he ever recognized this processioning south boundary line, if he supposed he was recognizing the extended south boundary line which run east from a point on the south bank of the river, such recognition would not bind him." Now, the judge supposed a case which was not made out by the proof.

[Overton's heirs vs. Cannon.]

[Mr. Ready here commented upon the evidence, to show that Overton had never recognized and adopted the processional survey.]

But if the evidence of recognition, proved every thing contended for, the charge of the judge was incorrect. Overton would not be concluded by a recognition of the south boundary of Gilchrist's processioning survey. It would only be evidence of boundary, to be submitted to the jury as other evidence, to be weighed and considered of by them. The judge's charge relieved them of that trouble, by deciding for them the effect of the testimony.

The recognition of, and acquiescence in a boundary, cannot bind in a shorter period than would be required to create a bar under the statute of limitations when there has been an adverse possession. *Adams vs. Rockwell*, 16 Wend. 285: *Kip vs. Norton*, 12 Wend. 127: *Jackson vs. Brown*, 1 Cains' Rep. 358.

Meigs, for Cannon, cited, 9 Yer. 55: M. & Y. 69.

TURLEY, J. delivered the opinion of the court.

This case turned, in the court below, upon the question of whether the defendants were estopped, by a processional survey made by Malcolm Gilchrist, a deputy surveyor, from claiming land covered by their grant and not included in the processional survey. The defendants denied that they were, because, they said, the survey was the unauthorised act of the surveyor, made without the consent of the owners, and binding on no one. This, the plaintiff denied, but also contended, that, even, if this were so, the survey was afterwards recognised and adopted by the owners as the evidence of their boundaries, and that they are thereby as much estopped from claiming beyond them, as if the survey had been originally made by their authority. Much proof was heard on both the propositions, which need not be particularly set forth, in as much as the question rests here upon the correctness of the charge of the circuit judge, who tried the case.

There was proof that John Overton, one of the owners, went with Malcolm Gilchrist to procession the land under the act of 1806: that they ran and marked the first line: the second line called to run south 894 poles to a stake, crossing Duck river. When they went to the distance called for, Gilchrist stopped and refused to run further, Overton insisting on the lines being extended across

[Overton's heirs vs. Cannon.]

the river. When they could not agree, they both determined to go to the surveyor for his opinion; he decided that Gilchrist was right, and Overton wrong, upon which Overton left, and Gilchrist, without further authority from Overton, returned of his own accord and completed the survey, pursuant to his opinion of the manner in which it should be made, by which a large amount of land covered by the grant is excluded and lost to the owners, if it be permitted to stand.

Upon this point, the court charged the jury: "If Overton agreed to leave the determination of the question to the principal surveyor, and to be bound by his decision; and if the principal surveyor decided the question against Overton, and the survey was afterwards made in pursuance of that decision, it would be binding upon Overton, although against his wishes, unless he had countermanded or revoked the authority to Gilchrist, before he made the survey."—This charge was too strong, and was well calculated to mislead the jury.

There is an attempt made here, to draw a distinction between the case, where the deputy surveyor and party interested go to the principal surveyor to get his opinion on the matter in dispute between them, and the case, where they agree to leave it to his determination. If they take the opinion of the surveyor, the person injured need not countermand the survey, but if they leave it to his determination, he must, treating it somewhat as an arbitration. We cannot recognise this distinction, but hold the law to be, that where the deputy refuses to procession according to law, and is sustained by his principal, and makes a survey, by which a man's land is taken from him, an authority for him to make it must be proven; that in the absence of proof, the legal presumption is, that it was unauthorised. And that when the proof shows that the owner and deputy began to procession and disagreed as to the mode, and went to the principal surveyor for instruction, who decided for the mode adopted by his deputy, which mode was illegal, and highly injurious to the owner of the land, that a countermand of survey is not necessary, and if it were, that a refusal on his part to have any thing more to do with it, would, in the absence of other proof, be sufficient to establish the countermand.

Upon the question of a recognition and adoption of the processional survey by Overton, after it was made, there was much proof, proper to be left to the jury. The judge charged, "that, if after

[Overton's heirs vs. Cannon.]

the survey was thus made, Overton, with a knowledge that the south boundary line had been run and marked by M. Gilchrist in his proceSSIONAL survey, recognised or adopted it, it would bind him, although he had only recognised it one day."

This portion of the charge is, also, too strong; if the word "*and*," had been substituted for the word "*or*," and the words "proceSSIONAL survey" for the words "south boundary line," so as to make the charge read, "if Overton, with a knowledge that Malcolm Gilchrist had made the proceSSIONAL survey, recognised and adopted it, as the true boundaries of his tract, he would be estopped by it," the charge would have been right; but to hold, that a man shall be estopped from claiming his just and legal rights by a hasty, ill-advised and momentary recognition of a line, which had been illegally run, we think would be exceedingly dangerous, and well calculated to unsettle rights to land, by exposing them to the fraudulent conduct of the land-monger, and the danger of having it supported by perjury, the necessary consequence of the reception of parol proof to establish the recognition.

The case will be reversed, and remanded for new trial.

SAUNDERS and MARTIN vs. TURBEVILLE, et als.

1. Where goods were delivered under a contract of sale with a condition made at the time of sale, that a note for the purchase-money should be given with an endorser: Held, that no title to the goods passed till the note with an endorser was given according to the contract, and that the goods were subject to be attached in equity by the owners, in the hands of a trustee to whom they had been subsequently conveyed.

2. Where goods are obtained by fraud, the contract of sale is void and the property in them remains in the original vendor.

3. Where the owner of goods delivers them under a contract of sale, and subsequently proposes to take a deed of trust on them from the individual to whom he has delivered them, takes notes for the payment of the purchase-money payable at different times from the times of the original contract, and takes a power of attorney to confess judgment and also takes an assignment of other effects to secure the payment of such notes: Held, that such proposition and acts are in affirmance of the title of the vendee, and that the original owner shall not be heard to urge that the title to the goods do not pass.

4. Where a deed of trust was made to save harmless certain securities against contingent liabilities, the vesting the owner of the goods with power by the deed to keep possession of them, and to continue selling them by retail, and to account for the proceeds, does not render the deed fraudulent, as against the creditors of such individual.

5. Where such individual, to whom the goods were so entrusted as aforesaid, by the provisions of the deed, appropriated them contrary to the provisions of the deed: Held, that this constituted no evidence of fraud on the part of the beneficiaries in the deed, there being no proof that they had any knowledge of such fraudulent misappropriation of the effects.

This bill was filed on the 8th day of May, 1838, in the chancery court at Gallatin, by Martin & Saunders against Turbeville and others, for the purpose of having a contract of sale and a deed of trust declared void. Saunders & Martin were wholesale merchants and partners in the town of Nashville. Turbeville was a retail merchant in the town of Springfield, in Robertson county. On the 7th of April, 1838, Turbeville applied at the house of Saunders & Martin for the purchase of a lot of goods. The pecuniary condition of Turbeville was not regarded as being very good. As he had but little capital upon which to embark in the business, and as he was somewhat inexperienced, Saunders offered to sell him the goods which he wanted, but required personal security for the payment of the money.

The bill charges, that Turbeville was embarrassed in his circumstances and that complainants were unwilling to sell him the goods

[Saunders, et al. vs. Turbeville, et al.]

without personal security; that Turbeville promised to give Thomas B. Matthews as endorser on notes which he would execute, payable at nine and ten months after date, with interest after six months; that complainants regarded Matthews as satisfactory security for the money, and thereupon, upon that express condition, delivered him goods of the value of \$1409 86.

The allegation of the bill in reference to this agreement of Turbeville was denied by the answer of Turbeville and by the parties for whose use the deed of trust was made. Turbeville admitted, however, that he promised to give *him* as an endorser, if he could get him to endorse for him, but denied that such promise was a condition precedent to the delivery of the goods.

The goods were accordingly set apart in the store house, and Turbeville left Nashville for Springfield. On his way home he met a waggoner with his waggon which presented an opportunity to get the goods from Nashville to Springfield on favorable terms, and gave the waggoner an order on Saunders & Martin for the delivery of the goods to him, which was done accordingly. Saunders wrote the notes for the payment of the purchase-money, payable to T. B. Matthews, for the amount due according to their understanding of the terms of the contract, and transmitted them to Turbeville by the next mail after the purchase of the goods, with the request that he would sign them and get the endorsement of Matthews and return them to complainants at Nashville. The testimony bearing upon this point is set forth in detail in the opinion of the court which follows hereafter. Turbeville applied to Matthews to procure his endorsement of the notes, but Matthews refused to endorse them for him. Turbeville, for the time, said and did nothing more in reference to the endorsement.

Turbeville had previously administered upon the estate of his deceased father, Wm. Turbeville, and had given W. Powell, W. Kirby, Thomas B. Matthews and R. Bartlett as his securities for the faithful performance of the trust. Turbeville held in his hands some three or four thousand dollars of the money of the estate, and the distributees had instituted suit against him and his securities for their respective shares of such estate. See *Harrison vs. Turbeville*, ante p. 242. Becoming alarmed at their situation, and being apprehensive of loss, they demanded of Turbeville indemnity. Turbeville on the 20th of April, executed a deed of trust purporting to be intended to save harmless the said securities in the ad-

[Saunders, et al. vs. Turbeville, et als.]

ministration bond. This deed, after reciting that Turbeville had administered on his father's estate in the county of Robertson, and had given the above named individuals as securities in a penal bond for the sum of \$10,000, for a faithful administration of his trust, and that there was in his hands about the sum of \$4000 due the distributees, bargained and sold, for the purpose of indemnifying the said securities, to Spencer Turbeville, one negro boy, one horse, some household furniture, and "all the merchandise or goods now in the store house of M. J. Turbeville, supposed to be worth about four thousand dollars, the same to have and hold in trust for the said securities and for no other purpose whatever; that is to say, if the said M. J. Turbeville shall discharge the said bond and thereby exonerate them, (the said securities,) from all liability thereupon, then this deed to be void, but if said securities shall be damnified, or likely so to be, by reason of any judgment being rendered against them, then and in that case, that said S. Turbeville, on the requisition of either of said securities, is hereby empowered out of the above described property, either by sale or otherwise, to raise so much money as will meet said judgment or judgments," after giving notice, &c., or "if otherwise, the said trustee with the said Miles J. shall continue to sell off said goods by retail, keeping the accounts raised from the date of these presents distinct from those heretofore made, and at all times allowing said securities access to said books for inspection, and should they think fit, they may at any time appoint another trustee in the room of said Spencer Turbeville, and such as may be appointed shall pay off to said Miles J. all such balances as may be due said Miles J. after discharging so much as the securities may be liable for." This deed was acknowledged by M. J. Turbeville on the 23d of April, 1838, and registered on the 25th.

Turbeville continued in the possession of the goods, sold portions of them, and applied the proceeds to such purposes as suited him, without regard to the deed of trust, and secretly and clandestinely conveyed some of them, boxed up, to the State of Mississippi. He also removed the slave. It does not appear, however, that his faithless conduct was known or approved by the beneficiaries in the deed.

When these facts were communicated to Saunders & Martin, to wit, about the 1st of May, 1838, Saunders went down to Springfield for the purpose of attending to the investigation of the mat-

[Saunders, et al. vs. Turbeville, et al.]

ter. On his arrival, he called on the defendant, Turbeville, and charged him with having violated the agreement upon which he obtained the goods, to wit, the giving his note with an endorser. This, Turbeville admitted at some times, and at others equivocated on the subject. Saunders demanded a deed of trust on the goods. This, Turbeville refused, declaring he had already conveyed them. Turbeville then, at the instance of Saunders acting upon legal advice, gave him his notes for the value of the goods, due, and also executed a power of attorney to one Green, to confess judgment on the notes. He took an assignment of the notes and accounts of Turbeville as collateral security for the payment of these notes, and other smaller notes, which they held on him.

These were found wholly insufficient to satisfy the debts, most of them being on insolvent persons, although Turbeville had represented them as being ample for the satisfaction of the claims of the house of Saunders & Martin on him. The bill alleges, that the complainants did not intend in the acts thus done to sanction the previous fraudulent conduct of Turbeville, or to abandon any of complainants legal rights as to the goods.

The bill prayed that an attachment might be ordered to be issued, commanding the sheriff of Robertson county to seize the goods and hold them to abide the decision of the court, and also an injunction restraining the defendants from selling or disposing of said goods or any part of them, and from collecting any debts due upon any previous sale of such goods, &c. Rucks, circuit judge, on the bill verified according to law, ordered the issuance of the writs, which were issued accordingly.

At a subsequent period, the complainants filed a supplemental bill in which they alledged, that they had obtained judgment against the defendants, had procured the issuance of a *fi. fa.* which was in the hands of the sheriff of Robertson county, and that they had directed him not to sell the goods, till the further order of the court.

The securities answered, and alledged, that they were informed and believed, the sale of the goods was absolute and unconditional, and declared that the deed of trust, made for their benefit, was made in good faith and was not fraudulent. The complainants filed replications to the answers, and the case came on for hearing at the October term of the chancery court at Gallatin, 1840, on the bill, answer, replications, exhibits and proof. Ridley, chancellor, presiding, being of the opinion that the goods were sold and delivered

[Saunders, et al. vs. Turbeville, et als.]

without any condition, and that the deed of trust executed on the 20th of April, for the benefit of Turbeville's securities, was not fraudulent in law or in fact, dismissed the bill of complainants and taxed them with the costs. From this decree complainants appealed to the supreme court.

F. B. Fogg, for complainants. The general principle is, that where there is no bankrupt law, an insolvent debtor may prefer one creditor to another, but such preferences are to be viewed with jealousy and should be strictly construed so as to guard against abuse and fraud. *Riggs vs. Murray*, 2 John. Chan. Reports, 565, 577.

In this case there are two questions:

1st. The property in the goods sold by complainants did not pass, for two reasons; first, it was conditional, and an endorser was to have been given. The proof fully sustains this. Saunders' statements made at the time of the contract, before the goods were delivered, are part of *res gestæ*, and therefore proof. See 11 Pickering, 362. See, also, as to conditional sales, 1 Paige's Ch. Rep. 312: 6 John. Ch. Rep. 437: 17 Mass. Rep. 606: 4 Pickering, 449. Secondly, Turbeville was insolvent and concealed that fact, and the goods did not therefore pass. 1 Paige's Ch. Rep. 492: 2nd do. 171, 2.

2nd. The deed of trust is fraudulent. There was no change of possession. 7th Paig. Ch. Rep. 163: 3 Rand. Rep. 410. The fact as to Turbeville's carrying off the goods and negro is fully proved; the deed reserved to him the power of control and sale.

3d. Saunders was induced to make the arrangement in Springfield by fraud and misrepresentation, and of course it was void, and Saunders & Martin could not be deprived of their previous rights thereby.

James Campbell, for defendants. 1. If goods are unconditionally sold and delivered, the vendor must look to his security. The goods were not procured by fraud, and no right of property was reserved at the time. See *Chapman vs. Lathrop*, 6 Cowen, 110: 2 Mason, 236: 2 Marsh. Ky. Rep. 576.

2. The possession of the goods by Turbeville and sale of them, for the purpose of carrying into effect the deed of trust, as provided in the face thereof, is not inconsistent with the rights of the se-

[Saunders, et al. vs. Turbeville, et als.]

curities and not fraudulent in law. There is no pretext for the assertion, that the deed was not made for *bona fide* purposes.

3. The subsequent fraudulent disposition of a portion of the goods by Turbeville cannot affect the rights of the beneficiaries of the deed, as there is no evidence that they assented to his conduct or sanctioned it in any way whatever. 18 John. Rep. 515.

W. A. Cook, for complainants.

GREEN, J. delivered the opinion of the court.

The original bill in this case alleges, that the complainants had sold M. J. Turbeville a parcel of goods on condition that he would give a note for the price with one T. B. Matthews as endorser, and that, relying on his performance of this condition, they had delivered to him the goods, which in a few days afterwards he conveyed in trust for the security of the other defendants, who were his securities for the faithful administration of his father's estate, and that he had wholly failed to obtain the endorsement of Matthews, or give them security for the price of the goods. They insist that they did not part with their title to the goods, until the condition of the sale was complied with, and this not having been done, they have a right to reclaim them, notwithstanding the deed of trust in favor of the other defendants.

The supplemental bill states, that the complainants had obtained a judgment at law against Turbeville, upon which a *fi. fa.* had issued, and had been levied on said goods, but that they had directed the sheriff not to sell until the matters could be heard in equity; that the deed of trust for the benefit of the other defendants was fraudulent and void, and prays a decree to set it aside, and that the property be sold for the benefit of the complainants.

Turbeville, in his answer, denies the contract for the goods to have been as the bill states it, or that there was any condition in the sale, and states that complainant, Saunders, suggested to him that Matthews would endorse his note, upon which suggestion, defendant promised to procure the endorsement of Matthews, if in his power; that Matthews refused to endorse for him, and that the goods were delivered without condition to him, and obtained without fraud on his part, and were conveyed to the other defendants without fraud, to indemnify them for liabilities they were under for him.

The other defendants insist that the title to the goods was vested

[Saunders, et al. vs. Turbeville, et als.]

absolutely in Turbeville, by the sale and delivery, and that the conveyance for their benefit was fair and *bona fide*.

George Thomas, one of the clerks of Saunders & Martin, states that on the evening the goods were sold, and before they were invoiced, Mr. Saunders remarked to him, that said Turbeville had agreed to give T. B. Matthews, of Robertson county, as endorser on the notes. Mr. Saunders told witness, he would not sell Turbeville goods without an endorser.

Wm. A. Walsh, another clerk in the complainants' store, states, that on the evening that Turbeville laid by the goods, and before they were invoiced or delivered, he heard Mr. Saunders say that he considered it a first rate sale, as Turbeville had to give Thomas B. Matthews of Robertson county as security.

H. S. Kimble states, that J. W. Saunders, of the firm of Saunders & Martin, went to Springfield, where Turbeville lived, in a few days after Turbeville had received and opened the goods he had purchased of Saunders & Martin, and after the goods had been conveyed to a trustee for the security of the other defendants; that Saunders and Turbeville went to the office of the witness, where Saunders urged Turbeville to give *him* a deed of trust on the goods *also*. Turbeville refused, and Saunders adverted to many arguments to induce Turbeville to comply, and among others remarked, "you know, Mr. Turbeville, that when you bought our goods, you were to give Mr. Matthews as your endorser, and having failed to do so, I think you cannot object to doing any thing you can to secure our debt." To the frequent repetition of these remarks, Turbeville would sometimes drop some short expression of indirect acknowledgement, and sometimes he would remain silent, but refused to give the deed of trust. Turbeville told Saunders that if he would wait a few days, he would still give him security. But Saunders insisted that his credit was gone, and that no one would be his security. Saunders urged him to make an assignment of his books and accounts, which Turbeville had stated were worth four thousand dollars. Turbeville still insisted he would give good security, but finally yielded, and made the assignment. Saunders urged that the books and accounts from the slight examination he had given them would not be sufficient to secure him. Witness proposed that Turbeville should make a power of attorney to some person to confess a judgment in favor of Saunders & Martin at the next term of the circuit court, which would enable Mr. Saunders

[Saunders, et al. vs. Turbeville, et als.]

to test the validity of the deed of trust. The parties agreed at once to this proposition, and the power of attorney was executed.

J. Green, states, that after complainants filed their bill, he had a conversation with Miles J. Turbeville, in which he stated to Turbeville that he had heard that the purchase of the goods was made upon condition that he was to give Thomas B. Matthews as endorser for the purchase, which said Turbeville did not deny to have been the contract.

The goods were sold on the 7th of April, 1838, and on the 8th the complainants wrote a letter to Turbeville at Springfield, enclosing two notes, one at nine months and the other at ten months, for the amount of the bill of goods, in which they state, "that agreeably to our understanding they are both made payable to T. B. Matthews, who will cheerfully endorse them, we have no doubt."

In a postscript to the same letter, they offer to sell Turbeville hats, and tell him to send an order for any he might want. The deposition of Miles J. Turbeville was taken in behalf of the other defendants, and states in substance, the facts as they are stated in his answer. The deed of trust is dated the 20th of April, 1838 and was registered on the 25th of the same month. The goods in controversy and other property, were conveyed to Spencer Turbeville in trust, to secure the other defendants as securities of said Miles J. Turbeville.

Upon these facts it is insisted, by the complainants counsel, that the goods were sold to Turbeville upon a condition precedent, that he was to execute a note for the price, with Thomas B. Matthews as endorser, and that not having done so, the property in the goods did not pass, notwithstanding the delivery of them to him. From the most careful scrutiny of the evidence in this cause, we are unable to arrive at the conclusion, that there was such condition precedent.

There is no admission by Turbeville that such a condition was made part of the contract. On the contrary he denies its existence in his answer, and also in his deposition. If the testimony of Thomas and Walsh be admissible as part of the *res gestæ*, this evidence is only proof of the fact, that Saunders said Turbeville had agreed to give Matthews as endorser. Kimble and Green only prove statements in the presence of Turbeville that he was to give Matthews as security, which he did not deny.

[Saunders, et al. vs. Turbeville, et al.]

If the terms in which the statements are made, were to be taken as the terms of the contract, we cannot perceive that it contains a condition precedent, that the security was to be given before the title to the goods could vest in Turbeville; but when we take into view the letter of the complainants, referring to the endorsement of Matthews as a matter understood between the parties, which they had no doubt he would do, and urging additional purchases of goods, which it was proposed to send to his order, it is apparent, that although it had been agreed, that a note with Matthews' endorsement should be procured, if practicable, yet that the sale of the goods did not depend upon that as a condition.

The expression in the letter, that they had no *doubt* that Matthews would cheerfully endorse the notes, is indicative of their confidence in Turbeville, and their willingness to trust the procurement of Matthews' endorsement by him. In the same letter too, they offer to extend further credit for additional goods, without mentioning the subject of security for them. Add to this, the goods were delivered to the carrier without requiring the security first to be given, or annexing any condition whatever thereto.

Mr. Saunders' treatment of the case agrees with this view of the facts. Although Turbeville had been several weeks in the possession of the goods, no step is taken in relation to the claim, until he heard of the assignment to the defendants. And then when he went to Springfield, although he alleged that the assignment was fraudulent, yet he set up no claim to the goods as his property. On the contrary he urged Turbeville to give him a deed of trust also on the goods, thereby acknowledging the title to them to be in him. When he failed to obtain a deed of trust on the goods, he took notes due at their date, instead of nine and ten months afterwards, with a power of attorney to confess judgment on them, and as a security for this payment, he sought and obtained an assignment of Turbeville's books and accounts. After so many acts in relation to this subject, each predicated upon the supposition of Turbeville's ownership of the goods, the right of the complainants to attach them as their property could not be countenanced, even if the proof in relation to the contract were much stronger than it is.

This view of the case is decisive also of the other ground upon which they insist they are entitled to the goods. If Turbeville were guilty of fraud in procuring the goods, the contract of sale would be void, and the complainants would have remained owners.

[Saunders, et al. vs. Turbeville, et al.]

But no such allegation is made by Mr. Saunders at Springfield, nor does he claim any title to goods for such cause. Independent of this, we do not perceive any evidence in the record going to establish the charge of fraud upon Turbeville in the procurement of the goods. Upon the whole, therefore, we think the title to the goods did pass to the purchaser by the sale and delivery, and that the complainants trusted to the good faith of Turbeville, and the willingness with which they supposed Matthews would endorse the notes.

2. The next and only remaining question is, whether the deeds of trust are fraudulent, either upon their face, or for facts extrinsic thereof, proved in the cause. It is contended that the provision in the deed, that Miles J. Turbeville, with the trustee, was to continue to sell off the goods by retail, constitutes them fraudulent.

This proposition, it is true, gave Turbeville the joint possession of the goods, and thereby put it in his power to waste them, or put the proceeds of the sales in his own pocket, and it may therefore have been, and, as it has turned out, doubtless, was an imprudent arrangement. But this stipulation is not inconsistent with the conveyance, as the Trustee was to remain in the joint possession of the goods, and as Turbeville's possession was not for himself, but as the agent and servant of the parties for whose benefit the deed was made. If he were honest and trustworthy, this arrangement would be manifestly for the benefit of all concerned. He was acquainted with the business and could manage it better than one who knew nothing about it. The sales, too, would be made at a higher price than would have been produced at auction. And as we are not to suppose in advance that a man will act dishonestly, we can perceive nothing in this arrangement indicative of a fraudulent intent in the parties to the deed.

As to the existence of facts extrinsic of the deed, that render it fraudulent, we do not perceive them. It is true, Turbeville used a small portion of the funds to pay a debt due from him to a third person, and it is probable, that in violation of his trust and of honesty, he abstracted a portion of the goods, and conveyed them to Mississippi. But there is no proof, nor ground to suspect that the other defendants knew of or consented to these acts, and if no fraud is to be inferred from the fact that he was constituted one of the agents to sell the goods, surely none can be imputed, because of his subsequent faithless conduct.

[Saunders, et al. vs. Turbeville, et als.]

We think, therefore, that the bill must be dismissed. But as the circumstances of the case furnished grounds, which well warranted this investigation, and as this proceeding has probably saved to the parties a considerable portion of the effects secured by the deed, the costs of the cause in this court will be paid out of the fund in controversy. Affirm the decree.

APPENDIX.

[This case was decided some years ago at Nashville, and was omitted in the Reports of that date. As the court, in the case of *Claxton vs. The State*, ante p. 181, referred to this case without disapprobation, and seem to approbate it, and as the Reporter regards it as sound law, it is deemed worthy of insertion here.]

JOHNSON and WIFE vs. THE STATE.

1. If a parent in chastising his child exceed the bounds of moderation, and inflict cruel and merciless punishment, he is a trespasser and liable to be punished by indictment.

2. It is not the infliction of punishment which constitutes the offence, but the excess; and what shall be regarded as excessive, is not a conclusion of law for the court to announce, but is a question of fact for the determination of the jury.

3. Where the circuit judge, after reciting certain facts as stated by witnesses, told the jury if they believed the statement of these witnesses, then the chastisement inflicted by the parent exceeded "the bounds of moderation and reason, and was barbarous in the extreme:" Held, that this was making, what constituted excess of punishment, a conclusion of law, was an invasion of the province of jury, and therefore erroneous.

TURLEY, J. delivered the opinion of the court.

The right of parents to chastise their refractory and disobedient children, is so necessary to the government of families and to the good order of society, that no moralist or law-giver has ever thought of interfering with its existence, or of calling upon them to account for the manner of its exercise upon light or frivolous pretences. But at the same time that the law has created and preserved this right, in its regard for the safety of the child it has prescribed bounds beyond which it shall not be carried.

In chastising a child, the parent must be careful that he does not exceed the bounds of moderation, and inflict cruel and merciless punishment; if he do, he is a trespasser, and liable to be punished by indictment. It is not, then, the infliction of punishment, but the excess which constitutes the offence, and what this excess shall be, is not a conclusion of law, but a question of fact for the determination of the jury.

[Johnson, et al. vs. The State.]

Bearing in mind this principle, let us examine the charge of the court below, and see whether this case has been properly submitted to the jury. The judge said, "If the jury believed that the defendants took hold of the child, and one of them struck the child with her fists, and pushed her head against the wall, and then led her off to another house, and with a stick or switch struck her, as she was led along, and that the defendants took the child into a room and tied her to a bed-post with a rope, and kept her tied there for two hours or even half an hour, and in that situation whipped her with a cowskin at different intervals, as described by witnesses, it would clearly exceed moderation and reason, and would be barbarous in the extreme." Now, under this charge, what was left for the consideration of the jury? Surely nothing but the credibility of the witnesses. They were told, if they believed them, then there was excess of punishment. Now, is not this making what constitutes excess of punishment a legal conclusion, instead of a question of fact, or is it not charging the jury upon the fact? Unquestionably it is.

By the constitution of this State, judges are permitted to state the testimony, and declare the law; but they are prohibited from instructing the jury upon the weight of the testimony, or as to the conclusion, to which it must bring their minds. This is peculiarly the province of the jury itself, and constitutes the very purposes for which it is made to form a part of our judicial system. In this case the judge should have said to the jury, if you believe the facts (stating them) as proven by the witnesses, and in your opinion, they constitute excess of punishment, then the law pronounces the defendants guilty.

This would have been keeping the power of the court and jury within their proper sphere. But when the court told the jury what the result of the facts proven (if true) would be, a power was exercised not given by law, and a verdict given under the charge cannot be sustained.

We are, therefore, of the opinion that the judgment in this case be reversed, and the cause remanded for a new trial.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE.

JACKSON: APRIL, 1841.

SHEPPARD vs. JOHNSON.

1. Whether a statute is the law of the land within the meaning of the 8th section of the bill of rights, always depends upon two propositions: 1st. That the legislature had the power to pass it. 2d. That it is a general and public law, equally binding upon every member of the community.

2. If the legislature had the power to deprive a freeman of his freehold by an act of legislation, yet the court would not adjudge that that body intended to exercise so high a prerogative, unless the law so declared in express and direct terms; such a result could not be arrived at by equitable construction of a statute.

3. A grantee who neglected to have his land proccessioned in accordance with the act of 1819, is not bound by an erroneous proccession made by the surveyor, and estopped thereby from claiming to his true line.

George D. Johnson instituted this action of ejectment in the circuit court of Haywood county, on the 8th day of June, 1838, against Egbert Sheppard, for the recovery of the possession of land, lying in said county, and in the possession of Sheppard. Johnson derived his title from a grant by the State of North Carolina, to John Rice, and Sheppard from a grant, by the same State, to Jos. Green. Both of these tracts were surveyed previous to the year 1789, by Isaac Roberts, and according to the surveys of said Roberts, as now ascertained, the grants lie adjoining each other, and do not conflict.

In the year 1819, the legislature, with a view of preventing litigation, passed an act, directing the surveyors general of the several districts, lying south and west of the Congressional reservation line, to give notice in the newspapers to the owners of North Carolina grants, to come forward and have them proccessioned, and in

[Sheppard vs. Johnson.]

the event that they did not do so, that the surveyors general should proceed to procession them, &c.

In the year 1819, Adam R. Alexander was appointed surveyor general of the district in which the land in controversy lies. Alexander testifies, that according to the terms of the act of 1819, he did, on the 17th day of June, 1820, make publication in one newspaper published in Nashville and one in Knoxville, for all persons claiming lands in said tenth district, by virtue of grants from the State of North Carolina, to come forward by the time specified in said act and procession their grants, and that said office would be open on the first Monday in December, 1820, for receiving entries. That he had made diligent enquiries for the field-notes of Isaac Roberts, the surveyor who had surveyed the Hatchie connection, of which the land in controversy was a part, but was unable to procure them. That Murray, his lawfully authorised deputy, under his directions, processioned the Rice and Green grants, and that in accordance with the processional survey so made, he laid down the said grants on the general plan of the appropriated lands of his district. Alexander further testified that Murray informed him that he was wholly unable to trace out and identify the corners and lines called for in the Roberts survey.

It appeared from other testimony, that the survey of Roberts and the survey of Murray varied from each other. That according to the survey of Roberts, the defendant, Sheppard, was living within the limits of the Green grant, but according to the survey of Murray, he was on the Rice grant, and that the survey of Murray threw about 750 acres of land belonging to the Green grant within the boundaries of the Rice grant.

Martin, judge, upon the above facts, charged the jury, that by the act of 1819, grantees of land in the Western District, had the privilege of identifying their own lands, by having them processioned or surveyed; that in the event they failed to have them processioned as the act directed, and within the time therein prescribed, it became the duty of the surveyor general of each district, to give notice as is by said act directed, and upon such information as he could procure, to survey all the grants which might be within his knowledge, lying in his district, and spread the same upon the general plan of his district; that where the grantee failed to have his grant processioned within the time prescribed, and the surveyor afterwards surveyed the same, and spread the same upon the

[Sheppard vs. Johnson.]

general plan of his district, such re-survey and re-marking would be binding and conclusive, and the grantee would be estopped from denying or disputing such lines, although they might vary from the original lines and corners, and cover other and different lands from those covered by the original location, unless such surveyor acted corruptly and fraudulently, with the intent to injure the grantee; that the law presumed that the surveyor had acted honestly and done his duty in all things.

He further charged the jury, that the new lines as marked by the surveyor, were in contemplation of law the lines of the original survey, and that the conclusion of the law could not be contradicted by showing that the lines and corners of the original survey were different from the lines and corners of the re-survey.

The jury returned a verdict in favor of the plaintiff, for all the land in possession of the defendant, which was covered by the processional survey. The defendant appealed in error.

Loving, for the plaintiff in error. The defendant insists that there is error in the charge of the circuit judge, and alleges that whilst it is admitted, that in the case of *McNairy vs. Hightower*, 2d Ten. Rep. 302, *McKean vs. Tait*, 1st Ten. Rep. 199, processioning or re-marking was held binding; and in the case of *Garner & Dickerson vs. Norris's lessee*, 1 Yer. Rep. 62, *Houston's lessee vs. Pillow & Thomas*, *Ib.* 481, *Davis's lessee vs. Smith & Tapley*, *Ib.* 496, *Clark vs. McElhanie*, not reported, *McLemore vs. Brown*, MSS., *Riggs & Prichard vs. Parker*, Meigs' Rep. 43, the doctrine of estoppel as a positive rule of law, was applied to re-marking, &c., by which the State and grantee were estopped; yet it will be seen in all these cases, that the grantees, or those claiming under them, were parties present at the re-marking or processioning, and assenting thereto, by which act they were estopped. See Com. Dig. Estoppel A. An estoppel is, when a man is concluded, by his own act or acceptance, to say the truth, &c.

But in the case before the court, neither of the grantees or claimants was a party to the survey of 1819, and, therefore, did nothing to be estopped by. See *Whiteside vs. Singleton*, Meigs' Rep. 207, where Overton refused to let Gilchrist proceed with the procession under the act of 1806, and the survey was held to bind no one.

2nd. In all the cases of re-marking or processioning, the doc-

[Sheppard vs. Johnson.]

trine of estoppel is not unqualifiedly applied, but conditionally so. The re-marking must be in reasonable conformity to the grant.— See *Garner & Dickerson vs. Norris's lessee*, 1 Yer. Rep. 62, *Houston's lessee vs. Pillow & Thomas*, *Ib.* 481, *Davis's lessee vs. Smith & Tapley*, *Ib.* 496, *Riggs & Prichard vs. Parker*, Meigs' Rep. 43.

3rd. The question, whether the re-survey or re-marking is in reasonable conformity with the calls of the grant, is a question of law, that should be passed upon by the court, and its judgment thereon given in charge to the jury. See 1 Yer. Rep. 488, the case of *Houston's lessee vs. Pillow & Thomas*, and the case of *Riggs & Prichard vs. Parker*, Meigs' Rep. 43.

4th. Whilst we admit that the legislature might well pass such an act as the one of 1819, ch. 1, without doing violence to the constitution, and injury to the vested rights of any, yet we insist, that the consequences flowing from that act, by the error committed in the survey made by Murray, *has* involved the vested rights of individuals, if they are to be forced to take the land in the new survey, without their consent, in place of the land called for and lying within the calls and boundaries of their old grants and lines, to an extent not sanctioned by the constitution; and that said survey must stand for naught, and be for nothing held, being void for want of constitutional power in the legislature. See *Jackson vs. Davis*, 5 Cowen's Rep. 123, and *Jackson vs. Frost*, 5 Cowen, 346, 2 Dallas, 304; and the case of *Blake vs. Dougherty*, 5th Wheaton, which shows that the grantee is entitled to the land specified in his grant, if the grant is not void for uncertainty; and if the beginning corner can be found and identified, the grantee shall have his land there, and cannot be compelled to take other land.

J. H. Talbot, for defendant in error. It is contended that the act of 1819, ch. 1, sec. 7, 8, 2 Scott's Rev. 449–50, directing the surveyors general to *procession* the North Carolina grants after giving public notice in the papers, requiring the owners of said grants, on or before the 1st day of October, 1820, to cause the same to be *processioned*, does not bind the said *grants to the processioning lines* thus made by the surveyor general, in default of the owners coming forward, and themselves causing the surveyor to procession them. This is certainly an erroneous view of the subject, when we

[Sheppard vs. Johnson.]

look at all the acts upon the subject of processioning lands. The first act on the subject is the act of 1723, ch. 1, entitled, "An act for settling the titles and bounds of land." See 1 Scott's Rev. p. 34. The first section of which, requires all persons to procession their lands once in every three years, and the 5th section provides, that the same shall be done by the surveyor general, attended by four reputable freeholders, in default of the *owner* causing the same to be done, which bounds so established by the surveyor, "shall be deemed a sufficient processioning as if the same had been been done by the consent of the party."

The 6th section provides, that where the land of any person has been twice processioned, such person shall be deemed and adjudged the sole owner of said lands, and that upon any suit commenced for such lands, the party in possession may plead the general issue and give this act in evidence.

The act of 1729, ch. 6, 1 Scott, p. 42, was next passed, entitled, "An act for the more effectual and speedy putting in execution the act for *settling the title and bounds of people's lands*," the first section of which, makes some immaterial alterations as to the mode of appointing freeholders to procession the lands, and imposes higher penalties for neglect of duty in such freeholders. The 3d section provides, that where the bounds cannot be fully ascertained by such freeholders, they shall make return thereof accordingly; that in such case, the surveyor may be ordered to run the bounds at the charge of both parties, in the same manner as is before (in the act of 1723) provided to be done, where one party refuses to have his lands processioned.

I refer to these acts to show what was the design of this *processioning*, and the meaning of the term *procession*. It certainly means the *establishment* and *fixing* of boundary, by which, in the *very nature* of things, *all* parties are bound.

Then comes the act of 1806, ch. 1, sec. 21, 1 Scott, p. 899, which enacts, that it shall and may be lawful for any person or persons, who may be desirous of *establishing the bounds* of any lands he may claim by virtue of any title derived from North Carolina, or which may thereafter be derived from that State, which said title is good and valid in law, to cause the same to be *processioned*, &c. Now it cannot be denied, that if the terms of this act were complied with by making the publication as required, that, not alone the person seeking to establish his *boundary* would be precluded from

[Sheppard vs. Johnson.]

setting up any other boundary, but all persons adjoining would be bound, if they had *actual* or *constructive* notice of the proceeding. Under this act mere *private surveys* were made, which our courts have decided, bound the party making such private survey, but they have never ruled, that where notice was given, and the proceeding was in *conformity to law*, that those who owned lands *adjoining* would not also be bound by such processioning. Such laws are based upon public policy, the quiet of titles and possessions, requiring every man, who holds real property to look after it, that all may know what and where every one claims. Upon the same policy is based all our acts of limitations and registration laws, and numerous other laws that might be cited.

When the legislature of 1819 came to legislate upon the subject, after the treaty of 1818, when the lands south and west of the Congressional reservation line were to be opened for entry, having experienced great inconvenience from defective legislation upon this subject, they took hold of the subject like men who understood what they were about; they knew, that about one-third in value, if not in area, of all this country was covered by old grants from North Carolina. There was what is called the "Big creek connection," covering the northern half of Shelby, and the Southern half of Tipton counties; next "the Big Hatchie connection," covering the northern half of what is now Tipton, and extending up through the middle of Haywood; next "the Forked Deer connection," covering a part of Lauderdale, Haywood, Dyer and Gibson; next "the Obion connection," covering a large part of Gibson, Obion and Weakly counties; next "the Big Sandy connection," covering almost the whole of Carroll county, and numerous other smaller connections upon the Tennessee and other waters.

These old grants, if ever *actually* surveyed, from the long lapse of time, and the death of those who were present at their survey, in all probability, could not be identified. A large number of citizens had claims for land, and had a right to demand of the legislature, by suitable enactment, to require of those who had old claims, to show *where they were*, and so to designate them, that justice should be done to all. With such feelings, the legislature of 1819, took up the subject, and after laying off the country in five surveyors' districts, and providing for the appointment of a surveyor general for each, they direct the whole country to be divided into sections of 5 miles square. And by the 7th section of the act,

[Sheppard vs. Johnson.]

each of the surveyors general are required to cause to be published at least three weeks in one or more papers at Nashville and Knoxville, the boundaries of his district, notifying all persons who may be desirous of making entries within the same, the day on which his office will be open, &c., and requiring all persons claiming lands within the said district by virtue of grants from N. Carolina, to cause the same to be *processioned* before the first day of October, 1820, &c. Can it be doubted what the legislature meant by the term *procession*? it was a term well understood, and had a technical meaning. If the grantees had applied to the surveyor general, and required of him to procession their lands, and he had run the lines *precisely* as they were run by the surveyor in 1820, none would doubt, but the grantees would be bound by such lines. But the legislature saw, that if they stopped here, *as was proved by former enactments on this subject*, they would not avoid the difficulty anticipated; that many of the grantees would fail to attend to the requisitions of the law, and this country would be plunged in all the difficulties that had been visited upon other parts of the State, respecting the titles to lands; hence, they enact in the 7th section, that if any person or persons, claiming as aforesaid, shall fail to identify his, her or their grants agreeably to, and within the time prescribed by the foregoing section, it shall and may be lawful for the surveyors, and they are *required* to cause to be *run and plainly marked* in the manner prescribed by original surveys, all such grants agreeably to their calls respectively, provided the calls are special or depend upon other grants, the locality of which may be clearly identified, &c. And they further provide, that "when thus laid down it shall not be lawful for any subsequent enterer to cross said lines by a survey, upon any entry made under this act." It is argued that this prohibition shows that the object of the law was only to protect the old grants from the invasion of subsequent entries, and not to fix their rights, or to *establish their boundaries*; this construction would do great violence to the good sense of the enlightened body of 1819. They were aware, that in all probability not a single marked tree might be found. They were aware, that in many cases no surveys were *actually* made, and in no case were there more than two corners made to a survey, and in no case had *a line been marked from one corner to another*; and that, probably, they would have to be surveyed according to some special call, and if some corners should be found, many others might not, and, there-

[Sheppard vs. Johnson.]

fore, they provide that they shall "*be run and plainly marked;*" but lest some subsequent enterer might say, that as no trees, corresponding with those called for by the grant, were found, (should they fail to find them,) or that no actual survey was made at the time of the grant, and that, therefore, the survey was not made in conformity to law, the surveyor general is prohibited from receiving any entry or making *any survey to cross the procession lines.*

The legislature had, by the 7th section, and the first part of the 8th section, enacted, that the old grants should be *proccessioned*, either by the owners or the surveyor general, or sworn officer, or in other words, that their *boundaries should be established*, and this prohibition was only made to make it effectual. Such a construction as contended for by the plaintiff in error, would permit the old grantees to claim by the processioning lines or not,—to blow hot, or blow cold, (a thing abhorred by the law,) to claim to the old boundary on the one side, and to the new on the other, and thus produce interminable confusion. When some of the old corners were found at the extreme east end of the Big Hatchie connection, by James Brown, and he attempted to establish the doctrine, that the old grants must go to the old corners, he was resisted, and it was promulgated, whether right or wrong, that the question was settled, and here a large majority of the old grantees, *all*, I believe, except *one*, the landlord of the plaintiff in error, tacitly acquiesced in the decision. But should the doctrine be established, that it is optional with any one of them to claim to the old or the new corners, a batch of law suits would be engendered, to such an extent, that no man can predict the evil consequences. It should be recollected, this is not the only connection of old grants, where the old entries were not found, and others may be found hereafter. If these old grants are permitted to be moved from the position they now occupy, they of course will cover land now held by younger entries, *the whole length of the connection on the north.* Did the legislature of 1819, intend to permit this? To give such a construction to the act, must be in direct violation of their meaning. The object of all the procession laws as shown from the act of 1723, down to the act of 1819 inclusive, shows that the object of such laws was to *fix the boundaries* of such lands so processioned. The terms *re-marking* and *proccessioning* may be regarded in our laws as synonymous terms.

[Sheppard vs. Johnson.]

It has been contended that the re-survey has not been made in reasonable conformity to the grants, and, therefore, the grantees are not bound. This is a mistake; the question of "reasonable conformity," is a question of fact, "according to all the circumstances of the case." What were the circumstances in the case? These old surveys had been made upwards of 40 years; all those persons who were present when this old base line was run, were dead, the field notes lost or destroyed; a base line was only run east and west, and making but two corners to each tract of land, *no marks from one corner to the other*, and, therefore, the old base line was nothing but an imaginary line. How was the surveyor general of the 10th district to guess at what variation the *old base line* was run? More than reasonable exertions were not required by law. The court have said, that a survey is in reasonable conformity with the calls of the grant, provided it is made in good faith, although the compass may vary from the old survey.

The old corners, that were found by Brown in 1825, were found after the country was settled: he found by accident one of the corners of the *extreme eastern tract*, and by finding another he was able to calculate the variation at which the old base line was run, and, therefore, was able to find two or three others, but to this day, these surveys have not been run out, or they would lay according to the old base line. Such experiments were *arrested* by the decision in the case of *Brown vs. McLemore*, at Reynoldsburgh, where Judge Turley, sitting as special judge, delivered the opinion of the court. But should the plaintiff in error recover the land in controversy, there is no doubt many an experimental line will be run, and if one old grantee finds he can get the house or orchard of his neighbor, or his field, or land, he likes better, or a spring, he will bring a suit or take possession, and be sued; and a harvest of litigation will ensue. This was not the object of the act of 1819.

TURLEY, J. delivered the opinion of the court.

Two grants were issued by the State of North Carolina, one for two thousand five hundred acres of land to John Rice, the other for one thousand five hundred to Joseph Greer. These grants are founded on entries in what is called the Big Hatchie' connection, in the Western District of the State of Tennessee. This connection consists of a great number of locations made by Isaac Roberts,

[Sheppard vs. Johnson.]

previous to the year 1789, lying north and south of a common base line, and mutually dependant on each other. At the time these locations were made, the base line was run by Roberts, and trees at different places marked upon it. No other lines whatever were run or marked. The two entries of Rice and Greer lie on the north side of the base line, and adjoin each other. The lessor of the plaintiff claims under the grant of John Rice, and the defendant under that of Joseph Greer. These grants do not, by their location, conflict with each other; and the defendant's possession is confined to the limits of Greer's grant. This would seem to be conclusive upon the rights of the parties; and would be, but for a difficulty which has been produced by a procession of this connection of land under the provisions of the act of 1819, ch. 1. This act was passed to make provision for the adjudication of North Carolina land claims, and for satisfying the same by an appropriation of the vacant soil south and west of the Congressional reservation line. By the 7th section it is provided, that each surveyor shall publish the boundaries of his district, notifying all persons desirous of making entries within the same, of the day on which his office will be opened for the reception of entries, and requiring all persons claiming lands therein, by virtue of a grant or grants from the State of North Carolina, to cause the same to be processioned before the 1st day of October, 1820.

The 8th section provides, that if any person or persons claiming as aforesaid, shall fail to identify his, her or their grants agreeable to and within the time prescribed by the 7th section, it shall and may be lawful for the surveyor of the District in which such grants may lie, to cause the same to be run and plainly marked in the manner prescribed for original surveys, agreeably to the calls, provided they are special or depend upon the grants, the locality of which may be clearly identified; the lines of which when thus surveyed, and marked out and laid down upon the general plan, it shall not be lawful for any subsequent enterer to cross, but the same shall be notice to all subsequent enterers.

The owners of the Big Hatchie connection, neglected to comply with the provisions of the 7th section of this statute within the time prescribed, and the surveyor of the district in which it lies, proceeded to perform the duties required of him by the 8th section. In doing so, he commenced at the beginning corner of the base line, and in running east according to course, from not making a proper

[Sheppard vs. Johnson.]

allowance for the variation of the compass, and a neglect in searching for the marked trees on said line, he varied from the line originally run by Roberts south, to a considerable extent from the beginning to the end. He were not more successful in marking the dividing lines north and south between the different claims lying on the base line. By means of these mistakes, every grant is removed from the position it originally occupied, and made to cover lands not originally embraced by its lines. The consequence of this has been, that unless the owners of the lands in this connection would mutually agree to hold either by the old locations of Roberts, or by the procession made under the act of 1819, there will be a very entangled confliction of boundary between them. This they have not done. For the lessor of the plaintiff claims under the procession, and the defendant under the original location; and it is this that produces the controversy between them, for by the procession the grant of Rice is made to cover a portion of the land contained within the grant of Greer according to the entry, and of which the defendant is in possession.

Upon the trial in the circuit court, the judge charged the jury, that if a grantee of lands in the Western District, failed to have his land processioned within the time prescribed by the act of 1819, and the surveyor of the district caused the same to be done and spread upon the general plan of his district, it would be binding and conclusive upon the grantee, and that he would be estopped from denying or disputing the lines thus established, although they might vary from the original, and cover other and different lands than were covered by the original location. There was a judgment for the lessor of the plaintiff, to reverse which this writ of error is prosecuted. The question for consideration is, whether the defendant is bound by the procession, and estopped thereby from claiming the land covered by his entry and grant according to their calls.

That the land in dispute is covered by the entry and grant of Joseph Greer, can admit of no controversy; and of consequence he and those claiming under him have had the legal title thereto. The question then is at once presented, if it be lost, how has it been done? It is not pretended it has been done by voluntary conveyance; and the 8th section of the Declaration of Rights in the Constitution of Tennessee, in conformity with *magna charta*, provides, that no man shall be disseised of his freehold but by the judgment

[Sheppard vs. Johnson.]

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[Sheppard vs. Johnson.]

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That the land in dispute is covered by the entry and grant of Joseph Greer, can admit of no controversy; and of consequence he and those claiming under him have had the legal title thereto. The question then is at once presented, if it be lost, how has it been done? It is not pretended it has been done by voluntary conveyance; and the 8th section of the Declaration of Rights in the Constitution of Tennessee, in conformity with *magna charta*, provides, that no man shall be disseised of his freehold but by the judgment

[Sheppard vs. Johnson.]

of his peers or the law of the land. It has not been done by the judgment of his peers, and it only remains to inquire whether it was by the law of the land.

It is contended that the act of 1819, is the law of the land, and that by a fair construction of it, the defendant has lost his right to the land that he originally owned, and is compelled to take in lieu thereof, other and different lands as specified by the erroneous procession of the surveyor under the powers vested in him by the act.

Whether a statute is the law of the land within the meaning of the 8th section of the Bill of Rights, always depends upon two propositions:

1st. That the legislature had the constitutional power to pass it.

2d. That it is a general and public law, equally binding upon every member of the community.

If we were to give the construction asked for by the lessor of the plaintiff to the act of 1819, we should find it exceedingly difficult, when tested by the above propositions, to declare it the law of the land. But we are relieved of the necessity of determining this delicate question, because we do not believe the construction asked for to be correct. Suppose the legislature to have the power to pass a statute, such as it is argued the act of 1819 is, by which a freeman is to be deprived of his freehold, yet this result cannot be produced by equitable construction, but must be by positive enactment. If the power exist, it is a high prerogative, and we will not intend that the legislature design to exercise it, unless they say so in express words. No argument from policy or inconvenience, or the harmony of system, can be permitted to have any weight, in the decision of such a question.

Has the legislature provided, then, by the act of 1819, expressly, that a grantee who neglects to have his land processioned as therein directed, shall be bound by an erroneous procession made by the surveyor, and estopped thereby from claiming to his true line? Assuredly not. Indeed, if construction could be resorted to for the purpose of establishing this principle, it would be found exceedingly difficult, if not impossible, so to construe the statute.

It is unquestionably true, that it was a thing very much to be desired that all the old grants in the Western District should be identified before the offices were opened under the act of 1819, for the reception of entries; and no doubt the legislature had great

[*Sheppard vs. Johnson.*]

anxiety to have this done, in order to prevent a conflict of titles and consequent litigation, with the evils of which they were well acquainted by previous experience; and no doubt they did design to do whatever they legally might, to cut off this fruitful source of mischief. They have provided that in the case of neglect on the part of the grantee to have his land proccessioned, the surveyor may do so from the best information he can procure, and cause the same to be placed upon the general plan; and that no entry shall be made within the limits thus proccessioned. If in addition to this, they had said that the grantee, in consequence of his neglect, should be bound by the proccession thus made, and estopped from saying that it did not cover his land, all danger of conflict and confusion would have been completely obviated. Who can doubt that nothing but an apprehended want of power prevented this being done? The statute is drawn with marked ability, and bears in its every feature, strong marks of a deep anxiety that the Western District should not be visited by that evil resulting from the uncertainty of land titles, which had afflicted so heavily the other portions of the State. Every thing is done to prevent conflicts between the old grants and new entries, except compelling the grantees to abide by an erroneous proccession of the surveyor. If the grantee proccession his land under the 7th section of the statute, there is an end of it. If the surveyor proccession it correctly, there is likewise an end of it. If it be proccessioned by the surveyor incorrectly, all persons are prohibited from interfering therewith; so that the grantee may take it if he pleases. So that the only contingency is a refusal on his part to be bound by an erroneous survey on the part of the State. The not having provided for this by express enactment, is almost conclusive evidence, that it was not so designed.

We then think the charge of the circuit judge was erroneous, because the statute does not expressly undertake to disseize the defendant of his freehold, and that if such a thing could be done by construction, such is not the legitimate construction of the statute. This decision is not in conflict with the case of *McLemore and Brown*, determined at Reynoldsburgh in 1829; that was a contest between the grantee and enterer. The grantee chose to take the land assigned by the State, and the entry was pronounced void under the 8th section of the act of 1819. The court expressly re-

[Tatum vs. Jameson, et al.]

fused in that case to determine the question made in this, as being unnecessary for its decision.

The judgment of the circuit court will be reversed, and the case remanded for a new trial.

TATUM vs. JAMESON and JOHNSON.

1. Bruce sold to Tatum ten head of cattle, delivered them and executed a bill of sale for them to Tatum: Held, 1st, that a verbal sale of such property was good and vested a valid title in the vendee. 2nd. That when a bill of sale is taken for such property the statutes of registration do not require it to be registered. 3d. That a bill of sale having been taken, it was properly read to the jury as the best evidence of the contract.

2. If a party contract for personal property and the possession remain in the vendor so that no title passes except by deed, the deed must be registered or it is void as to creditors.

3. A sale of a slave must be by deed registered; but the court have said that by construction the title passes by verbal contract and delivery, as between the parties, and that a deed registered is only necessary as against the creditors of the vendor.

Bruce sold to Tatum ten head of cattle for the sum of \$45 75, on the 28th day of January, 1839. The cattle were delivered, the money paid, and a bill of sale executed and delivered on the same day. Jameson sued out, in the county of Carroll, the county of the residence of the parties, an attachment against Bruce. This attachment came to the hands of Johnson, a constable, who levied it upon the cattle in the possession of Tatum. A judgment was rendered upon this attachment by a justice of the peace, and a *conditioni exponas* issued on the 29th day of January, 1839, and the cattle were sold by Johnson by virtue thereof. The bill of sale was registered on the 1st day of February succeeding.

Tatum sued Jameson and Johnson by suit in trover on the 13th of May, 1839, in the circuit court of Carroll county. The defendants pleaded not guilty, and justification by attachment. Issue was taken on these pleas and the cause was submitted to a jury at the January term, 1841, Totten, judge, presiding. He charged the jury, that the contract of sale having been reduced to writing and evidenced by deed, such deed must have been registered before the

[Tatum vs. Jameson, et al.] .

levy of the attachment, or the attachment would hold the property. The jury rendered a verdict in favor of the defendants. The plaintiff moved the court for a new trial which was overruled, and thereupon he appealed in error.

Bullock and McCorry, for the plaintiff. 1st. A sale of this description of personal property is not required by our statutes to be reduced to writing, and having been reduced to writing, it is not required to be registered.

2. It was the best evidence of the contract, and therefore properly admissible as evidence to the jury.

A. W. O. Totten. The attachment was levied on the property before the bill of sale for it was registered. The defendant therefore had a prior lien on the property, as a creditor of the vendor, provided it be necessary that bills of sale for such personalty should be registered.

"All bills of sale for the absolute conveyance of slaves or other personal property, shall be acknowledged by the party executing the same, or be proved by at least two subscribing witnesses, and be thereupon registered."—Act of 1831, ch. 90, sec. 1.

"All such deeds and other instruments mentioned in the first section of this act, not so proved and registered as aforesaid, shall be null and void as to existing or subsequent creditors or *bona fide* purchasers without notice."—*See same Act*.

Registration is necessary to vest the legal title, where the subject of the conveyance is real property, it being substituted for *livery of seisin*, and in this respect it is for the benefit of the parties. But in every other respect, the registry acts were made for the benefit of third persons, not parties to the contract of sale. Therefore a sale of personal property by parol, or writing not registered, is valid between the parties, but void only "as to existing or subsequent creditors or *bona fide* purchasers without notice." The statute does not declare the contract void as between the parties. Nor has the statute any operation unless those creditors or purchasers be creditors or purchasers of the grantor or vendor. The bill of sale was admitted and read as a registered paper; it was afterwards proved also, as a common law paper; the construction first given to the registry acts, by plaintiff's counsel, that the bill of sale could be properly read, as a registered paper, was correct. But as the defendant, a creditor of the vendor had caused the prop-

[Tatum vs. Jameson, et al.]

erty to be attached before the date of registration, the sale is void as to defendant. Vide *Hays vs. McGuire*, 8 Yer. Rep. 92: *Williams vs. Walton*, 8 Yer. Rep. 387: *Bradshaw vs. Thomas*, 7 Yer. Rep. 497: *Grady vs. Sharron*, 6 Yer. Rep. 321.

GREEN, J. delivered the opinion of the court.

This is an action of trover for the recovery of the value of ten head of cattle. The plaintiff proved the sale and delivery of the cattle to himself, by Felix M. Bruce, on the 28th of January, 1839, and the payment of \$45 75 therefor, by him to Bruce, which money Bruce immediately paid out in discharge of executions against himself. He also read a bill of sale for the same property, registered the first day of February, 1839, executed by Bruce to him. He also proved the execution of the bill of sale by the subscribing witnesses. He also proved that the defendants took out of his possession a part of said property. The defendants justified their seizure of the property by virtue of an attachment in favor of *Jameson vs. Bruce*, issued the 29th of January, 1839, and levied on the cattle in dispute the same day, by Johnson, the other defendant, who was a constable.

The court charged the jury, "that a parol sale of this kind of property was good, when accompanied by delivery and value paid; but when it was reduced to writing as by deed or bill of sale, it being of the character of this paper, it merged the verbal transfer and was of no validity until registration as against creditors of the vendor; so that the levy of attachment, if prior to registration, would hold a lien on the property."

The jury found a verdict for the defendants, and the plaintiff appealed to this court. The court erred in the charge to the jury in saying that the written evidence of the contract was of no validity until it was registered, as against creditors of the vendor.—This is not a contract of sale which the law requires to be evidenced by writing. A verbal sale and delivery (as the court properly told the jury) will vest in the purchaser a good title. But if he choose to take a written transfer, surely his title, which vested by the delivery, is not divested by the mere execution of a bill of sale by the vendor. The bill of sale only thereby becomes the best evidence of the contract, and in this case was very properly proved and read to the jury; but its registration not having been required by the law, could neither add to nor detract from its validity.

[The State *vs.* Cross.]

If a party contract for personal property, and the possession remain in the vendor, so that no title passes except by the deed, such deed must be registered, or it is void as to creditors or purchasers without notice.

But where no deed is necessary to pass the title, and consequently no registration necessary, the existence of a deed is of no consequence, except as constituting the best evidence of the terms of the contract. The case is not therefore embraced in the act of 1831, ch. 90.

It is not like the case of a slave. There the sale is required to be by deed registered. But the court, by construction, have said that the title passes by delivery as between the parties, and that a deed registered, is only necessary as it regards the creditors of the vendor. But this doctrine has no application to the case before the court. Let the judgment be reversed, and the cause remanded.

STATE OF TENNESSEE *vs.* CROSS.

1. Betting on elections is indictable. Act of 1823, ch. 25, sec. 2, N. & C. 491.

2. Where an order is made by a circuit judge directing a prosecution by the attorney for the State, *ex officio*, without limiting the time within which it must be executed, it operates as a mandate to the officer so long as the cause for making it exists, and the thing directed remains unaccomplished.

3. In an indictment for betting on an election, an allegation charging the pendency of the general election for a particular year, and that the bet was made upon the event of that election is sufficient. It is not necessary to charge that the defendant bet upon the success of any particular candidate.

At the March term, 1840, of the circuit court of Henderson county, Dunlap, judge, presiding, on the motion of King, district attorney, the following order was made: "It appearing to the satisfaction of the court, that James N. Cross," (and some twenty others) "have been guilty of a misdemeanor by betting upon elections, and it further appearing, that no person will prosecute them; it is therefore ordered by the court, that the attorney general file bills of indictment against them, *ex officio*, without a prosecutor marked thereupon."

At the March term at which this order was made, no bill of indictment was found by the grand jury. At the May term succee-

[The State vs. Cross.]

ding, King, district attorney, presented under and by virtue of the order of the previous term an indictment against Cross and others endorsed, "Filed *ex officio* by order of the court." This indictment charged, that "on the first day of August, 1839, in the county of Hardeman, there was pending an election for governor of the State of Tennessee, a representative in the congress of the U. States and a senator and representative in the general assembly of the State of Tennessee, and that one James N. Cross and J. K. Bettesworth, &c. on the first day of August aforesaid, in the county aforesaid, whilst the said election was pending, did bet and wager with each other upon the event of said election, money, bank notes, bills single, merchandise and other valuable things of the value of ten dollars, contrary," &c.

At the January term, 1841, the defendant appeared and moved the court to quash the indictment, which was done, Dunlap, judge, presiding. King, in behalf of the State, appealed in error.

Attorney General, for the State.

Fentress, for defendants.

GREEN, J. delivered the opinion of the court.

This is an indictment for betting on an election. The indictment was filed *ex officio* by the district attorney in obedience to an order made at the previous term of the court. It is insisted that this order ceased to confer such power on the district attorney from the expiration of the term at which it was made. We do not think so; there is no legal analogy from which such a conclusion can be drawn. When an order of court, directs a thing to be done, without limiting the time within which it must be performed, it continues to speak so long as the cause for making it exists, and the thing directed remains unaccomplished.

2. It is argued that the indictment is bad, because it does not allege that the bet was made on some particular election, and was dependant upon the result of that contest; that the allegation of the pendency of the general election for 1839, and that the bet was made upon the event of that election, is insufficient. We think the allegation is sufficient; the word "event" is as expressive as the

[Clark vs. Williams.]

word "result." It means, issue, hap, chance, success, that follows doing any thing, and is appropriately used to express the idea, upon which the bet depended. The allegation of the pendency of the election, and that the defendant bet upon the event of that election is sufficient. It is not necessary that the indictment should alledge that the party bet upon the success of any particular candidate. The circuit court erred in quashing the indictment in this case. The judgment must be reversed and the cause remanded to be proceeded in according to law.

CLARK vs. WILLIAMS.

The act of 1809, ch. 63, sec. 1, authorising an appeal in "any civil case" embraces cases of garnishment, and the party aggrieved in such proceeding hath a right to appeal from the judgment of the justice as in other civil cases.

Clark recovered judgment against Pate before Day, a justice of the peace for Madison county. Execution thereupon came to the hands of Sharp a constable. Sharp could find no property of Pate wherewith to satisfy this execution, and summoned Williams to appear before Day, the justice, on the 1st day of July, 1839, to say what he was indebted to Pate, and what effects of Pate he had in his hands or knew of. Williams appeared and answered that he had some money and some effects of Pate's, but not enough to satisfy the executions and claims which he had in his hands against Pate. Day rendered judgment on the answer in favor of Williams the garnishee. Clark appealed to the circuit court of Madison county. At the April term, 1840, of the circuit court, the court, Read, judge, presiding, dismissed the cause on the ground that the statute did not authorise an appeal in such a case.

Brinkley, for Clark, contended that the act of 1809, authorised an appeal; that a garnishee was made a "party" by summons; that he appeared, answered and judgment was rendered for or against him; that this was a civil proceeding, and that the parties were within the letter of the statute as well as the spirit.

Scurlock, for the defendant.

[Clark vs. Williams.]

GREEN, J. delivered the opinion of the court.

The defendant was summoned, at the suit of the plaintiff, before a justice of the peace, to answer as a garnishee, what he was indebted to one Hartwell Pate. He appeared, and having answered, the justice gave judgment against the plaintiff for the costs; and refused to give judgment against the garnishee. From this judgment the plaintiff appealed to the circuit court, where the defendant's counsel moved the court to dismiss the cause for want of jurisdiction, which motion was sustained and the cause dismissed.

The bill of exceptions states, that the reason why the court refused to take jurisdiction, was, that the court was of opinion that the statute authorising appeals from the judgment of justices, did not extend to garnishment cases. In this opinion there is error. The act of 1809, ch. 63, sec. 1, (Car. & Nich. 92,) provides that "when any person or persons may be dissatisfied with the judgment of any justice of the peace, in any civil cause, such person or persons so dissatisfied, shall have a right to pray an appeal."

The language in this statute is broad enough to embrace the case under consideration. After the issuance of the summons there is a cause pending between the original plaintiff and the garnishee. There is, therefore, no reason, why the act should not apply to this cause, as well as to any other.

But it is said that the legislature by another act, treating the garnishee as a witness, and allowing him compensation for his attendance when summoned, in the same manner that witnesses are paid, evince, that he is not to be regarded as a party to the suit. It may be remarked, in the first place, that it is not the province of the legislature to expound the meaning of previously existing laws. They can say what shall be the law, but are not authorized to say what it is. But the act referred to, does not indicate that the garnishee is not to be considered as a party to the cause. It was very proper that in a case where a man was to be proceeded against, when he could not prevent it, when he was in no default, he should be protected from injury. The act of 1821, ch. 40, allowing a garnishee to stay execution of any judgment against him, is certainly no argument for restricting his right to appeal, when the words of the act allowing an appeal, are broad enough to cover his case.

The practice has constantly been to entertain appeals in these

[Long, et al. vs. Hicks.]

cases. In the case of *Turner vs. Armstrong*, 9 Yer. 412, the garnishee appealed from a judgment rendered against him by a justice; which was affirmed in the circuit court, but which was reversed in this court. Let the judgment be reversed, and the cause be remanded to the circuit court to be proceeded in.

LONG and BYRNE vs. HICKS, ADM'R OF WEBB.

A warranty does not extend to defects which are visible to the vendee at the time of the sale and warranty, or to those of which the vendee is cognizant.

Long and Byrne instituted an action of trespass on the case in the circuit court of Madison county, on the 1st day of April, 1839, against Hicks, administrator of Webb. There were two counts in plaintiffs' declaration. The first set forth, that on the 7th day of February, 1837, the defendant, as administrator of Webb, deceased, in consideration of the sum of \$825, sold to the plaintiffs two slaves, to wit, Hannah, aged 18 years, and her child Wesley, aged 15 months, by a certain instrument of writing signed by defendant, as administrator of Webb, (of which *profert* was made,) by which the defendant promised the plaintiffs that said Hannah and her child were both sound and well, and that the plaintiffs confiding in said promise and undertaking did buy the said slaves at and for the price of \$825; that in truth and fact the said Wesley was unsound and diseased, and became of no value, &c.

The second count was for money had and received. The defendant pleaded non assumpsit, upon which issue was taken. The cause was submitted to a jury at the April term, 1840, Judge Read presiding. The plaintiffs introduced and read to the jury an instrument of writing in the following words:

"Received of Long & Byrne their note at nine months, for \$825 in full, for negro Hannah, aged 18 years, and her child Wesley, aged 15 months, both sold as the property of K. Webb, deceased, sound and well, free from all lawful claims whatever, given under my hand and seal, February 7th, 1837.

A. W. HICKS, ADM'R."

It appeared from the testimony that the said Wesley was affected from his birth with a disease of the spine, and was diseased at

[Long, et al. vs. Hicks.]

the time of the sale and warranty; that the diseased condition of the boy was apparent to casual observation; that Byrne was told that the child was unsound and that he said the woman was worth the money.

The plaintiff proved also that if Wesley had been sound, he would have brought two hundred and fifty dollars. The counsel for the plaintiffs objected to the introduction of testimony in reference to their knowledge of the unsoundness of the slave. The court charged the jury, that if the negro was unsound at the date of the warranty, there was a breach of the warranty, and that they were to disregard the testimony as to the knowledge of the plaintiffs in reference to the unsoundness.

The jury rendered a verdict for the plaintiffs for the sum of \$182, and motion for a new trial having been made and overruled and judgment rendered, the defendant appealed in error to the supreme court.

Brinkley, for Hicks. A warranty does not bind where it is visibly false, or the falsehood is known to the vendee. 2 Bing. Rep. 603: 10th Ves. Rep. 508: 10th Law Lib. 338: 2 Cains' Rep. 302: Cro. Jac. 387. In this case, it was proven, that the unsoundness of which the plaintiffs complain, was so obvious and apparent that it could be perceived by the most casual observer, and it was also proven, that it was known to the plaintiffs. As the plaintiffs knew what they were buying, it is not for them now to object. It is to be supposed as this unsoundness was well known to the parties at the time of the sale, it was taken into consideration, and a deduction made therefor, in the price of the negroes. And this is evidenced by the conduct of one of the purchasers, who, when informed the child was unsound, remarked, he did not care, as the woman was worth the money.

Henderson, for Long and Byrne. This is an action on the case brought on a written warranty of soundness, signed by plaintiff in error as administrator, in the sale of certain negro slaves, part of the estate in his hands to be administered. The declaration alleges an unsoundness of a negro child, Wesley, included in the warranty, and this unsoundness, together with deterioration in value was proved on the trial by men of skill and science.

The defence of the defendant below rests on the following evi-

[Long, et al. vs. Hicks.]

dence, offered in proof and excluded by the court from the consideration of the jury, to wit, that the child Wesley was at the time of sale obviously unsound to any person who would observe, and that one of the plaintiffs below, when told on the day of sale that the child was unsound, said "he did not care, the woman was worth the money." Under these circumstances the warranty was executed. No fraud or circumvention is alledged or proved.—The question for the court is as to the propriety of excluding this evidence; and again, if received, has it any weight.

1. The warranty is in writing and that writing is the only legitimate evidence on the subject, unless in case of fraud. 2 Starkie 902. In *Mumford vs. McPherson*, 1 John. 418, it was held that the contract of warranty having been reduced to writing every thing resting in parol was thereby extinguished. 2 Cains, 161: 5 Viner, 515, Pl. 18; 517, Pl. 26. In these cases it was attempted to bring in an additional warranty not contained in the writing, and if this cannot be done surely no parol statement of facts in direct contradiction of the writing should be received. See also *Kain vs. Old*, 9 Com. L. R. 207, 8.

2. The alledged obvious and patent character of the defect and unsoundness does not discharge the party from his clear warranty freely and knowingly given. The rule only applies where there is doubt as to how far it was intended to warrant. 2 Starkie, 905. *Butterfield vs. Burraus*, 1 Salkeld, 211. Besides every principle of justice would estop a party from denying that which he has alledged in his solemn written warranty. Any expressions alledged to have dropped from the party, as to his indifference on the subject of the unsoundness, form no part of the contract of warranty and were well rejected. The verdict of the jury is moderate and should not be disturbed.

TURLEY, J. delivered the opinion of the court.

The plaintiff in error sold to the defendants a negro woman and child and entered into a written warranty that they were sound and well. The proof shows that the child was unsound from his birth and of no value whatever, but that the unsoundness was so obvious that any one who had ever seen a negro might discover it by casual view, and that Byrne, one of the purchasers, upon being told, during the sale, that the child was unsound, said he did not care, the woman was worth the money. The court withdrew this

[Long, et al. vs. Hicks.]

testimony from the jury and instructed them to disregard it; that the written warranty of soundness was binding on the vendor, and if the property was unsound at the time of sale and date of the warranty, there was a breach of the warranty. Under this charge a verdict was found in favor of the plaintiff below and judgment given thereon; to reverse which this writ of error is prosecuted.

The testimony rejected by the court was pertinent to the issue and ought not to have been withdrawn from the jury. A written warranty does not extend to defects which are visible, or of which the vendee is informed at the time of the sale. 2 Cains Rep. 202: 7th Bingham's Rep. 603: 10th Law Library, 338, Croke Jac. 387. The charge of the court therefore is erroneous and the judgment must be reversed and the case remanded for a new trial.

BOOKER and CLARKSON vs. WILLIAM TALLY.

Wm. Tally, jr. having no credit at the store of Booker & Clarkson got goods of them directing them to charge the goods to his father, Wm. Tally. Booker & Clarkson did so charge them at the time. On being informed of the fact W. Tally, sen'r, said they had done right in charging the goods to him and that he would pay for them: Held, that the credit having been given in the first instance to the father and he having subsequently recognized the authority of the son to get the goods made the debt his own, and that he was properly chargeable therewith.

This case was tried before the Honorable W. C. Dnnlap at the June term, 1840, of the Tipton circuit court. All the facts necessary to a correct understanding of the principles involved in the decision of the cause are set forth in the opinion of the court.

Searcy, for plaintiffs in error, cited *McClain vs. Dunn*, 4 Bing. 722: 15th E. C. L. Rep. 141: Chitty on Contracts 61.

J. W. Harris, for defendant in error. No person shall be held responsible for the debt or default of another unless the engagement so to do, be in writing; Nich. & Car. 350, act of 1801, ch. 25, sec. 1. The goods here, were delivered to W. Tally, jr., and the debt created before any promise was made to pay the debt. This is clearly within the statute of Frauds. Roberts on Frauds, 209, 225. He understood the rule of law to be that if the person for whose use the goods are furnished is liable at all, that any promise

[Booker, et al. vs. Tally.]

or engagement by a third person must be in writing, otherwise it will be void. The proof shows that Booker & Clarkson did regard W. Tally, jr., liable, else why their anxiety about his contemplated removal. 4th Yer. 576.

2. It is admitted that if Booker & Clarkson had given the credit originally to Tally, senior, and at his instance the goods were charged to him, he would be bound for the payment without writing, but the evidence does not show that W. Tally ever requested Booker & Clarkson to let his son have the goods. The proof is, that W. Tally, jr., got the goods and they were charged by Booker & Clarkson without the knowledge of W. Tally, sr. It was not until after the creation of the debt that W. Tally, sr., promised to pay it.

3. In order to charge W. Tally, sen'r, with these goods, there must have been an authority previously given, or his son was not the agent of W. Tally, sen'r. The subsequent declarations of the father could be used only as evidence of a pre-existing agency in the son. The proof shows that no such agency in fact existed, and the subsequent declaration of the father, that Booker & Clarkson did right in charging the goods to him is not even admission that any authority did in fact exist at the time.

GREEN, J. delivered the opinion of the court.

This is an action of assumpsit brought by Tally against Booker & Clarkson, to which they pleaded the amount of an account for goods sold and delivered, as an offset to plaintiff's demand.

It appeared in evidence that articles charged in the account to the amount of \$60 were delivered to Wm. Tally, jr., a son of the plaintiff, over the age of 21 years. William, jr. had no credit at the store of defendants, and he procured the goods directing them to be charged to his father, which was done at the time. Other sons and sons-in-law were in the habit of getting goods upon the plaintiff's account.

When William, jr. was about to remove from the country, the clerk in defendants' store called on the plaintiff and told him that some of the articles in his account had been gotten by his son William; whereupon the plaintiff said the defendants were right in charging the goods to him, and that he would pay for them. The court charged the jury that, "If the plaintiff in the first instance

[Booker, et al. vs. Tally.]

did not direct the defendants to charge the articles to him, he would not be bound to pay for them unless the promise to do so had been reduced to writing."

The jury returned a verdict in favor of the plaintiff disallowing the articles charged to him, and which had been delivered to his son William. The defendants moved for a new trial which was refused, and judgment was rendered on the verdict of the jury, from which judgment this appeal in error is taken.

We think the court erred in the charge to the jury. His Honor overlooked the distinction between where the credit is given in the first instance to the party receiving the goods, and the case where no such credit is given, but the goods were delivered on account of the person sought to be charged. In the former case the charge of the court would be correct; for the delivery of the goods to A. on his own account, creates a debt against him; and any promise of B to pay for the goods, must be a promise to pay the debt of another, and consequently must be in writing. And such was the case of *Matthews & Alderson vs. Milton*, in 4 Yerg. 576.

But in the case now under consideration, no credit was given to the party to whom the goods were delivered. He did not purchase them in his own name, but in the name of his father. The merchants did not know for whose use they were obtained, and the goods were delivered to William, jr. for his father, and charged in his account. In this transaction, Wm. Tally, jr. assumed to be his father's agent in making these purchases, and he was recognized and treated as such agent by Booker & Clarkson. The only question then is, was he such agent. Unquestionably a party may recognize the authority of an agent after the completion of a transaction as well as before. All that is wanting is, to know that the authority existed. And surely the admission made after the transaction, by the principal that it did, is as good evidence of the fact as if he had published the existence of such agency before hand. In this case Wm. Tally, sen'r. after the goods had been purchased, said that they had been rightfully charged to him, and that he would pay for them. He thus recognized the agency of his son William, to buy the goods and bind him by his acts. Let the judgment be reversed, and the cause be remanded for another trial.

FARMERS and MERCHANTS BANK vs. HARRIS.

1. The circuit judge charged the jury, that the testimony of the notary, (who stated that he had made enquiry of persons who, he supposed, knew the residence of an endorser, and got the best information he could obtain,) was not sufficient evidence of the requisite diligence to charge an endorser who had removed his residence: Held, that the judge invaded the province of the jury, in deciding upon the sufficiency of the testimony.

2. Where the court charged the jury, that when the distance between the residence of the holder and endorser is near and the communication frequent, in legal contemplation the holder would be presumed to have notice of the removal of an endorser: It is held, that this was trenching upon the province of the jury. This was a question of the weight of evidence to be decided by the jury.

McCorkle & Holmes executed a note to E. P. Stuart or order, for the sum of \$1273, payable and negotiable at the Farmers and Merchants Bank of Memphis, and due the 27th of October, 1838. This note was endorsed by W. Harris, and was discounted by the Memphis Bank. Harris resided at Randolph, on the Mississippi river, at the execution of the note; and in the month, July, 1838, he left the town of Randolph and fixed his residence at the town of Columbia, Maury county, Ten. When the note fell due, to wit, in October, 1838, it was protested for non-payment, and notice was sent to Randolph of the non-payment. At that time Harris resided in Columbia. Memphis, the location of the Bank, is about fifty miles below Randolph by water, both said towns being on that stream. They are distant from each, by land, about twenty-eight miles, and the communication is consequently frequent, and almost daily.

Suit was instituted by the Bank in the circuit court of Tipton county against Harris the endorser, and the case was submitted to a jury on the proof, Judge Dunlap presiding. The notary at Memphis, stated that he had made enquiries of persons who, he supposed, were acquainted with Harris's residence, and became satisfied, from the best information he could obtain, that Randolph was the place of the residence of Harris, and that he accordingly transmitted a notice to that place, of the non-payment of the note by the makers. The judge charged the jury, that the proof of Rose, the notary, was not sufficient proof of diligence, that he should have named the persons of whom he got his information, &c. He also charged the jury, that if the residences of the endorser and holder were near to each other, and the communication great, the

[Farmers and Merchants Bank vs. Harris.]

holder would, in legal contemplation, be presumed to have notice of the removal of the endorser, and bound to give notice to the endorser at his true place of residence.

The jury rendered a verdict in favor of the defendant. The Bank appealed in error to the supreme court.

H. G. Smith, for the Bank. 1. The declaration of the court to the jury, that the testimony of Rose, the notary, was not *sufficient* proof of the requisite diligence, involves a decision upon the sufficiency and weight of testimony. This, under our constitution, belongs to the jury. This was charging the jury with respect to a matter of fact, and is therefore erroneous. See article 6, sec. 9, of the Constitution of the State.

2. The commercial intercourse between two places, is undoubtedly a circumstance from which a jury might, in connection with other circumstances, infer a knowledge of a change of residence. This fact of notice of change of residence belonged to the jury, and when the judge charged the jury, that proximity of residence and frequency of communication, affected the holder with notice of change of residence, he erred, for which the judgment should be reversed.

John W. Harris, for the defendant. The contract of endorser to a note or bill is conditional, and the holder, if he wishes to hold the endorser responsible, is required to use the strictest diligence in making demand of the maker, and if he fails to pay, to give the endorser due notice of such failure. The endorser is entitled to strict notice. 20 John. Rep. 20. And the law requires that notice should be directed to his nearest post office, or to the one at which he is in the habit of transacting business. *Barr, Street & Co. vs. Marsh*, 9 Yerger, 153. If the post office, nearest the endorser, is unknown to the holder of the note, he is bound to make enquiries for the office to which a notice should be sent. Bayley on Bills, 279. Due diligence must in general be used to find out, and merely enquiring at the house where a bill is payable, is not due diligence for finding out an endorser. Bayley on Bills, 280. Ignorance may excuse notice, but reasonable diligence must be used to obtain knowledge. Bayley on Bills, 280, in note 1. Nor is there any presumption in law, that the place where the bill was drawn is the place of the drawer's residence, and if notice be sent there to

[Farmers and Merchants Bank vs. Harris.]

him, and in fact he does not reside there, that is not sufficient, if no enquiry be made, to ascertain his place of residence. Bayley on Bills, 283: Chitty on Bills, 487, top page.

Defendant's residence at the time of the protest of the note being in Columbia, Maury county, Tennessee, it was the duty of the holder of the note or the notary, to have addressed the notice to him at that place, and not to Randolph as was done. In order to excuse himself from not having done so, he must show by the clearest proof that he made diligent enquiry of such persons as were likely to know his residence; and if upon that diligent enquiry, made of the proper persons, he was informed that Randolph was his place of residence, and acting on that information, addressed the notice to Randolph, the defendant would be bound, otherwise not. *Dunlap vs. Thompson & Drennan*, 5 Yerger, 67: *Nichol & Hill vs. Bate*, 7 Yerger, 305: *Barr, Street & Co. vs. Marsh*, 9 Yerger, 253: *Marsh vs. Barr*, Meigs' Rep. 68: *Davis vs. Williams*, Peck's Rep. 191.

In the case decided in Meigs' Rep. 68, it was in proof, that the notary made diligent enquiry for the residence of Marsh, and among others of the Cashier of the Bank in Nashville, where the note was made payable, the post master at Nashville, of whom, it might have been supposed, as correct information, as to Marsh's residence, could be obtained as from any other persons. He also made enquiry of one of the parties to the paper, who, it must be supposed, was very likely to know the residence of the other on the paper, and his nearest post office, (which enquiry if made in this case, the information would have been obtained,) the result of which enquiry was the conviction on the mind of the notary that Jackson, Tennessee, was the proper and correct address of Marsh. In this case, in Meigs' Rep., the jury could not hesitate in coming to the conclusion, that the notary had used due diligence in finding out the nearest post office to Marsh, because the sources from which the information was gotten, as to his residence, were the most proper and natural.

But in this case, although the notary says, he enquired of persons who, he supposed, could give the best information as to defendant's residence, yet he does not inform the jury of whom he made the enquiry, so that they could be able to judge whether, in fact, he had used due diligence in ascertaining defendant's residence. He does not say of whom he enquired. The persons of whom he

[Farmers and Merchants Bank vs. Harris.]

sought the information, should have been made known to the jury, and then they would have been able to know, whether it was true or not, that he did enquire of those most likely to give the information. In the absence of such information they could not have found that due diligence had been used; and whether due diligence had been used is a question of fact for the jury.

REESE, J. delivered the opinion of the court.

The defendant was one of the endorsers of a note made payable at the Farmers and Merchants Bank of Memphis, and of which it became holder. At the time of his endorsement, in June, 1838, the defendant carried on business as a merchant, and was resident in the town of Randolph, which is situated upon the river Mississippi, about fifty-eight miles by water, and twenty-eight by land from the city of Memphis; and between those places there is much commercial and other intercourse and communication.— When the note fell due in October, 1838, the defendant resided in Columbia, Middle Tennessee, having removed in July, 1838. Notice of the protest for the non-payment of the note was sent by the notary, directed, through the mail, to the defendant, at the town of Randolph. The notary upon the trial, testified that “he made enquiry of persons whom he supposed to be informed of the residence of Harris, (the best information he could obtain,) and learned that Randolph was his place of residence. That the information he received was the best he could obtain, and satisfied him that Randolph was the place of Harris’ residence.”

The portion of the charge of the circuit court excepted to, is,

1st. “That the testimony of Rose, the notary, was not *sufficient* proof of the diligence requisite; that it was necessary for him to name the persons of whom he made enquiry, in order that the jury might judge whether the enquiry had been made of the proper persons, and that the defendant might be able to prove the oath of the notary false.”

2d. “That if the residence of the endorser and holder were near to each other, and frequent communication between the places or towns of their residence, the holders would in *legal contemplation* be *presumed* to have notice of the removal of the endorser, and bound to give notice at the true place of residence.”

We think there is error in both these propositions; but the error consists not so much in the views presented by the court, if they

[Sanderlin vs. The State.]

could be considered as a commentary upon the facts to aid the jury in arriving at a just conclusion as in the assumption by the court to decide, itself, the matter of fact which should have been left to the jury.

If in the first proposition, the court had said that the testimony was less *satisfactory*, for the reasons stated, or would have been entitled to more weight, if the persons, from whom the enquiry was made, had been named, it would have been very proper. But he ought not to have said that the testimony was *not sufficient*.

In the second proposition, he might well have said that proximity of residence and frequency of inter-communication, as they increased the means of hearing of changes of residence, so they increased the probability that such changes, when they occurred, were in fact known, but he should not have said, that a party, under such circumstances, was affected with legal notice as to the knowledge of them. We, for these reasons, reverse the judgment.

SANDERLIN vs. THE STATE.

1. The act of 1838, ch. 120, makes the sale of a quart or greater quantity of spirituous liquors to be drank at the place where sold, a misdemeanor and indictable.

2. The word "plantation" used in the statute of 1779, is of very extensive signification, and when applied to a town, must be taken to mean the lot of ground, adjoining room, or other house attached to or belonging to the premises where the liquors are sold.

3. The fact, that the person vending the liquor, furnished bottles, glasses, sugar, water, &c. to the purchasers, affords testimony proper to be left to a jury, to show that the vendor intended the liquor, sold, to be drank on the "plantation."

4. It is not necessary that an indictment for selling spiritous liquors by quantities greater than a quart, that such indictment should aver, that the liquors so sold were drank on the premises. It is the intention of the sale that constitutes the offence, and the fact that the liquors were drank on the premises, would be appropriate proof of the intention.

5. Where the State and county were written at full length on the margin, and the indictment proceeded to state, that the grand jury empannelled to enquire for the body of "the county aforesaid" present, that D. Sanderlin, late of said county, unlawfully in said county, did, &c. &c.: Held, that, in an indictment for a misdemeanor, the venue was sufficiently averred.

6. The same strictness is not required in the allegations in an indictment for misdemeanor as in those for felony.

The grand jury of Shelby county, at the June term of the cir-

[Sanderlin vs. The State.]

cuit court, 1840, produced in court, an indictment against Demsey Sanderlin, which was in the following words:

"State of Tennessee, }
 Shelby County, } Circuit Court, June Term, 1840.

"The grand jurors for the State of Tennessee, elected, impanelled, sworn, and charged to enquire for the body of the county aforesaid, upon their oaths, present, that Demsey Sanderlin, late of said county, laborer, on the 4th day of June, one thousand eight hundred and forty, with force and arms, unlawfully did keep a tippling house, and then and there did vend and retail spiritous liquors in less quantities than one quart, and by the quart, intended to be drank on the premises, against the form the statute in such case made and provided, and against the peace and dignity of the State."

The defendant moved to quash this bill of indictment, but Dunlap, judge, presiding, overruled the motion. The defendant then pleaded not guilty, and his case was submitted to a jury.

It appeared that the defendant had possession of part of a lot and house in the town of Raleigh, which was furnished with liquors, and that he sold at the time mentioned in the indictment, spiritous liquors by the quart, and that having furnished those purchasing it with glasses, bottles, water and sugar, they retired into an adjoining room in the same house, and on the same lot, and there drank the liquor sold. The defendant proved that he forbade all persons from drinking in his grocery, and that the other room in the house belonged to his father, and that he did not rent it, and had not the occupation of it.

The jury returned the defendant, under the charge of the court, guilty as charged in the bill of indictment. He was fined fifty dollars. A motion for a new trial was made and overruled. A motion was then made in arrest of judgment, which was also overruled. The defendant appealed in error to the supreme court, and was accordingly recognized to appear.

T. J. Turley, for plaintiff in error. The judgment in this case should have been arrested:

1st. Because the venue was not well laid. 1 Sand. Rep. 308, note 1: 2 Cro. Rep. 606: *Ibid.* 751: 3 P. Williams, 496-7: 1 Chit Cr. Law, 194.

2. Because no offence is charged in the indictment. The charge is, that he sold the liquor by the quart, *intending* it to be drank upon the premises; but does not state that the defendant *suffered*

[Sanderlin vs. The State.]

it to be drank, or that it *was drank* on the premises. The offence contemplated by the act is, selling the liquor, *intending* and *suffering* it to be drank on the premises. The *intention* alone, without its being drank on the premises, is no offence. 4 Black. Com. 21. Selling in *less quantities* than the quart, is an offence, but selling by the quart is permitted, if it is not drank on the premises; *ergo*, it is the drinking of it on the premises that makes the offence. The evil intended to be prohibited, was the gathering of crowds at groceries to drink, and the attendant evils.

3. The court should have granted a new trial, as it did not appear that the defendant had any power to prevent the purchaser from drinking in the adjoining room.

Attorney General, for the State.

GREEN, J. delivered the opinion of the court.

This is an indictment for selling spiritous liquors by the quart, intended to be drank on the premises. There was evidence that the plaintiff in error occupied the front room of the house as a grocery and sold liquors by the quart, which were drank in the back room, and in the yard, and that he furnished the persons who drank it with vessels, glasses, &c.

The court charged the jury "that if the defendant sold the spirits by the quart, with the intent that the purchaser should drink the same on the lot where the grocery was situated, he would be as guilty as if he had permitted it to be drank in the house; and that the defendant furnishing the bottles, glasses and conveniences of drinking the spirits, would be evidence of his intention as to where the liquor should be drank; that if they went and drank the liquor on the lot or in the house without his consent he would not be guilty."

The jury found the defendant guilty, and the court fined him fifty dollars, from which judgment he appealed to this court.

1st. There is no doubt, but that the act of 1833, ch. 120, makes the offence of selling a quart or greater quantity of spiritous liquors to be drank at the place where sold, an indictable offence; as well as the sale of a less quantity than a quart. In the case of *Dyer vs. The State*, Meigs Rep. 237, this court decided, that retailing spiritous liquors was an indictable offence. The act of 1779, ch. 10, was only referred to for a definition of the offence cre-

[Sanderlin vs. The State.]

ated by the act of 1838, ch. 120, and not with a view to indicate that the penalty prescribed by that act, was the *only* punishment which, by the law, is *now* to be inflicted upon the offender. That case decides, that the act of 1811, which made the retailing in quantities less than a quart indictable, is not in force. The act of 1779, neither made the retailing less quantities than a quart, nor the sale of a quart or more to be drank at the place where sold, indictable offences. It only inflicted a penalty recoverable by action. If a party therefore, by the act of 1838, be indictable for selling by a small measure, by the same argument it is proved that he is indictable for selling by the larger measure, when the liquor is intended to be drank at the place where sold.

When the case of *Moore vs. The State*, 9 Yerger, 353, was decided, the sale of a quantity over a quart, to be drank where sold, was not indictable; but the act of 1838, ch. 120, having made the retailing spiritous liquors an offence, without any reference to the quantity sold, to be punished as *other misdemeanors*; and the offence of retailing, by the act of 1779, ch. 10, being defined in the third section, to be *the selling any quantity less than a quart*, and by the twelfth section, *any quantity whatever, if to be drank at the place where sold*; it follows as an inevitable conclusion, that the latter species of the offence is put upon the same footing as to the mode of procedure, with the former; and that in addition to the *qui tam* action given by the act of 1779, they are both indictable by the act of 1838.

2nd. The charge of the court was clearly correct. The idea that a quart of spirits may be sold and drank in the yard, the back lot, or in an adjoining room, is a shallow device to evade the law. The words of the act are "provided the same be not intended to be drank on the *plantation* whereon the same are sold." This word *plantation* is of very extensive signification, and when applied to a town would be taken to mean, the lot, yard, adjoining room, or other house attached to and belonging to the premises where the liquor was vended.

The court was also right in saying that the person vending the liquor, furnishing the bottle, glasses and conveniences of drinking, thereby afforded evidence that he had sold it with the intention it should be drank at the place.

3rd. It is contended in argument, that the indictment ought to allege that the liquor was actually drank at the place where sold.

[Sanderlin vs. The State.]

This we think is not necessary. The statute makes the sale an offence, if the party selling intended the liquor to be drank on the plantation. This is enough to allege in the indictment. If he did not so *intend*, he would not be guilty, though the purchaser, against the will of the vendor, were to drink the liquor in his house. So, on the other hand, if he intended it to be drank there, he would be guilty, though the purchaser might take it away from the place. The actual drinking is only necessary to be proved as a circumstance from which to infer the intention of the party selling, and need not be alleged in the indictment.

4th. It is insisted, that the venue is not sufficiently laid in the indictment. The State and county are written at full length in the margin; after which it is stated, that the grand jury elected to enquire for the body of the *county aforesaid*, present, that Demsey Sanderlin, late of *said county*, on the 4th day of June, 1840, with force and arms in the *county*, unlawfully, &c.

Here the county of Shelby is written at full length, and twice referred to as the *county aforesaid*, and then by the words *the county*. It is true that, in strictness, the word *aforesaid* should have been added, and probably would be indispensable in an indictment for felony; but in a misdemeanor, where so much strictness is not required, we think this allegation is sufficient. It is not possible to mistake the meaning of the words *the county*. No other county had been mentioned but Shelby, and that having been written and referred to, *by the county aforesaid* twice previously, and then by the definite article "*the*," necessarily means that county, the name of which had been, immediately before, three times repeated.

The cases referred to in 2 Cro. 606, 750, the word "*county*" was omitted, as well as the word "*aforesaid*:" and the case in 3 P. Williams, 496, was an indictment for felony.

Let the judgment be affirmed.

P. M. MILLER vs. CHILDRESS.

1. Where a statute is plain and explicit in its meaning, and its enactment within legislative competency, the duty of the court is simple and obvious, namely, to say, *sic lex est scripta*, and obey it.

2. The act of 1801, ch. 18, giving a right to securities to be discharged from a note or obligation upon the refusal of principal, after notification to sue, is in derogation of common law and must be strictly complied with. A notice not in writing, or proven by less than two witnesses, will not satisfy the statute.

On the 9th day of April, 1840, Edwin H. Childress instituted an action of debt in the circuit court of Madison county against Pleasant M. Miller. The plaintiff declared in the usual form on a bill single, executed on the 19th day of January, 1837, by P. M. Miller, together with W. B. Miller, R. H. Byrne and John G. Chalmers, (who were not sued in this action,) for the sum of \$5000, payable twelve months after the date thereof.

To this declaration the defendant pleaded, that he signed the writing, obligatory, set forth in the plaintiff's declaration, as the security of William B. Miller, and in no other capacity whatever; and that afterwards, to wit, on the — day of — 183—, after the obligation fell due, R. H. Byrne, one of the co-securities with himself, notified Childress in writing more than thirty days before the commencement of this suit, to institute suit forthwith on said writing obligatory, and that if he failed so to institute suit that said securities would claim the benefit of the act of 1801, ch. 18; that said Childress, though notified as aforesaid, had without the consent of said Miller totally failed and refused to institute suit within thirty days after said notification. The plaintiff replied to this plea by denying it, and issue was joined thereupon.

At the August term, 1840, this issue was submitted to a jury, Judge Read, presiding. It appeared in evidence that W. B. Miller was the principal in the obligation, and that Byrne, P. M. Miller, and Chalmers were securities; that in the summer of 1839, Childress was called upon by Byrne and requested to sue on the writing. W. B. Miller testified that after the obligation fell due, and more than thirty days before the institution of this suit, Childress addressed him a letter requiring him to pay the same, in which he stated that he had been notified to institute suit thereupon; and that he had lost the letter; that some time after this he saw Childress, and asked him who had notified him to sue, and was informed by Childress that Byrne had *requested* him to sue.

[Miller vs. Childress.]

The jury, under the charge of Read, judge, that the notification to sue must be in writing and that there must be two witnesses thereto, returned a verdict in favor of the plaintiff for the sum of \$5000 debt, and \$1140 damages.

The defendant moved the court for a new trial. This motion was overruled and judgment rendered upon the verdict. Defendant appealed in error to the supreme court.

Brinkley, for Miller.

Totten, for Childress.

REESE, J. delivered the opinion of the court.

In this case, upon the trial in the circuit court, there was a plea under the statute of 1801, ch. 18, sec. 1, 2, 3, 4, that P. M. Miller was a co-security with one Byrne for one W. B. Miller, and that one Byrne gave written notice, &c. There was issue upon the plea, and a verdict for the plaintiff below. Without pausing to inquire whether the plea as pleaded was good under the statute or not, we shall only consider whether the court erred in the charge to the jury. That part of the charge was as follows, to wit:

“As to the question of notice to sue under the statute by the security, that the law required the notice to be in writing, and that nothing less than written notice would satisfy the statute; that as to the statute requiring two witnesses to prove a copy of notice, this was a guarded provision, growing out of the statute, for the benefit of the holder, that his rights should not be prejudiced by fraud, perjury or imposition; that, under the rule that the party's own admission should be evidence against him, (even should the jury suppose that the notice served in Childress' letter to Miller was written notice,) the law, assuming the principle above mentioned, would require the testimony of two witnesses to the fact, and that the testimony of a less number would not satisfy the statute.”

There can be no error in the above charge as against the plaintiff. The 1st section of the statute requires in terms that the notice shall be in writing, and the notice is to contain the absolute requisition forthwith to put the bond, note, &c. in suit. The 4th section provides explicitly that the security must prove in open court by two witnesses a copy of the notice aforesaid to have been served on the person bringing such action. Where a statute

[Crocket, et als. vs. Wright.]

is plain and explicit in its meaning, and its enactment within the legislative competency, the duty of the courts is simple and obvious, namely, to say *sic lex scripta*, and obey it. In this case, nothing is left to judicial construction, but if there were, it is clear that it occurred to the framers of the act, that this mode of discharge, contrary to the forms and course of proceeding at common law, might be in danger of tending to the wrong and injury of the holder of the note; so the notice was required to be in writing, and the notice was required to be proven by two witnesses. Of course the notice not in writing, or proved by a less number than two witnesses will not satisfy the statute. Let the judgment be affirmed.

CROCKET, HARPER & Co. vs. MOSES WRIGHT.

A justice of the peace has no power to render judgment against an endorser for any sum exceeding fifty dollars.

McAlister a justice of the peace for Obion county, issued a warrant at the instance of Crocket, Harper & Co. against Moses Wright. On the trial an obligation was introduced in the following words:

"\$65 00. Six months after date I promise to pay Moses Wright the sum of \$65 00 for value received, this 3d day of September, 1838. WILLIAM WILKERSON, [Seal.]

On the back of this instrument was the following endorsement: "I assign the within note to Crocket, Harper & Co., waiving the necessity of demand and notice. MOSES WRIGHT."

McAlister rendered a judgment against the endorser for the sum of \$69 87½. Wright appealed to the circuit court of Obion, where at the June term, 1840, the judgment of the justice of the peace was affirmed and upon the application of the defendant, an appeal in the nature of a writ of error was granted to this court.

Raines, for the plaintiff in error.

No counsel appeared for defendant in error.

Raines, J. delivered the opinion of the court.

This is a writ brought by an endorsee against an endorser before

[Crocket, et als. vs. Wright.]

a justice of the peace, for a sum exceeding fifty dollars, and the question is whether the magistrate had jurisdiction. This court determined, in the case of *Mitchell vs. Miller*, Meigs, 510, that by the act of 1837, ch. 22, sec. 1, extending the jurisdiction of justices of the peace, their jurisdiction is confined to the case of a liability arising directly out of the instrument itself, and does not embrace an indirect collateral or contingent liability, created not by the terms of the instrument but by operation of law, as the liability of an endorsee, &c. But the question now before us is, whether the 2nd section of the act of 1831, ch. 59, has been repealed by the terms and purview of the act of 1835, ch. 17, secs. 1 and 2. The section of the act first above referred to, provides that, "a justice of the peace out of court shall have jurisdiction of all cases of one hundred dollars or under, as well against the endorser or endorsers as against the maker or makers of a bill, bond or promissory note, whether for cash or trade." The first section of the act of 1835, ch. 17, provides that a justice of the peace "shall have and exercise jurisdiction over all debts and demands, due on any specialty, note or agreement signed by the party to be charged therewith, on which the judgment will not sound in damages, &c." and the 2nd section of the same act gives jurisdiction over all sums not exceeding fifty dollars which may be due (among other enumerated cases) "by contract in writing signed by the party to be charged therewith, on which the judgment would sound in damages, whether due by obligation, note or assumpsit," &c. The mere recital and placing in juxta-position of the above provisions, sufficiently shows, it seems to us, that the 2nd sec. of the act of 1831, cannot stand. The terms "judgment sounding in damages" used in both sections of the act of 1835, excludes, and must have intended to exclude liabilities between endorsee and endorser above the sum of fifty dollars, the judgment upon which at that time would sound in damages. The point indeed is involved in discussion in the case of *Mitchell vs. Miller*, Meigs, 510. For if notwithstanding the provisions of the act of 1835, the jurisdiction in such cases, was to the amount of one hundred dollars, the act of 1837 would have extended it to two hundred dollars. It may fairly be supposed that the experience of the country between 1831 and 1835, satisfied the warmest advocates of these domestic tribunals, of the difficulty, not to say, total impracticability of their judicious or even just application of the principles of the law merchant, in such ca-

[Barry vs. Nuckolls.]

ses, to the rights of parties in trials before them. We think therefore that a magistrate has not jurisdiction in such case, above the sum of fifty dollars. And we may be permitted to remark that if it were doubtful whether or not the act of 1831, ch. 59, sec. 2, were in force, it would be our duty to sustain the negative, because the constitution of the U. States having provided that the trial by jury shall be preserved, all such extensions of jurisdiction are of doubtful propriety, and the reason originally given by our courts to sustain the extension of jurisdiction to the sum of fifty dollars, namely, that the right of trial by jury was not by it impaired, because an appeal was provided, a reason of doubtful force at the time, became weakened on each successive extension of jurisdiction; because the obtaining of such appeal is made more and more difficult. But we entertain no doubt that the act of 1835 does repeal the 2nd section of the act of 1831, and therefore, we reverse the judgment.

BARRY vs. NUCKOLLS.

Nuckolls rented a room to an association of individuals, at six dollars per month, for the purpose of performing plays. After this contract Barry became a member of the association, and as such, used and occupied the room: Held, that Barry was not liable for the rent, before or after he became a member, upon a count on the special contract, or upon a count in *indebitatus assumpsit* or *quantum meruit* for work and labor done.

This action of assumpsit, for use and occupation, was instituted in March, 1839, in the circuit court of Hardeman county, by Nuckolls against Barry, Dunlap, judge, presiding. The declaration contains three counts; the first upon a special contract; the others on a general *indebitatus assumpsit*, and *quantum meruit*. The bill of exceptions shows that the plaintiff proved a contract for the rent of his house by certain persons, calling themselves a "Thespian Society," for so long a time as they might choose to occupy it, at the rate of six dollars per month. That they took possession, fitted it up, and commenced the performance of plays. That several months after the making of this contract, and the taking possession, the defendant became a member, and performed parts in plays. That he was not a member when the contract was made,

[Barry vs. Nuckolls.]

nor for long after. The court on these facts, charged the jury, "that the defendant would not be bound for the previous, but would be bound for the subsequent rent, without a new contract in ratification of the former." The jury rendered a verdict for plaintiff for \$106. A motion for a new trial was made, overruled, and judgment rendered on the verdict. Defendant appealed.

V. D. Barry, for plaintiff in error.

1. An incoming partner is not bound for previous contracts of the firm. Montague on Part. 135, 139, 145: Collyer on Part. 301, 303, 304, 307, 295, 296: Smith's Mer. Law, 28: Selwyn N. P. 316: Gow on Part. *passim*: Chitty on Con. 71, 76.

2. Where one enters into partnership with one, who is tenant under a lease, this gives the landlord no right of suing the firm. Collyer, 308: 2 Marshall Rep. 434: *Hoby vs. Roebuck*, 7 Taunt. 157.

3. So of adventures, the incoming partner is not liable for the price of the goods. Collyer, 301, 308: 4 Taunt. Rep. 582, *Young vs. Hunter*.

4. Where a new partner comes in, an acceptance by the old partners, for an old debt in the name of the new firm, does not bind the new partner, in the hands of the creditor. Byles on Bills, 24: East's Rep. 48, *Sheriff vs. Wilks*.

As to the nature of this tenancy, it is not from month to month, nor for any fixed period in law or in fact, but strictly a tenancy at will.

1. Where parties agree on a tenancy so long as both may please, it is strictly tenancy at will. Comyn on Landlord and Tenant, 8, 9, 91. When for an indeterminate period, it is from year to year. Do. Chitty on Con. 96.

As to the proof necessary to sustain the action:

1. A contract will not be implied from the mere fact of occupation; there must be an express promise, or a recognition of the general right of the plaintiff to recover. 2 Dane's Abr. 446: 9 Dowling & Ryland, 480: 22 E. C. L. R. 394.

In general, as to clubs, &c.

1. Assent is necessary by the members of a club to a purchase by one for the use of the club. Selw. N. P. 313: 2 Stark. R. 416: Selw. N. P. 316.

2. Suppose members of a church rent a house for the purpose

[Barry vs. Nuckolls.]

of worship, will it be held that all who may afterwards become members can be sued by the landlord for the rent?

Where an express contract is proved, there is no room for one to be implied. "*Expressum facit cessare tacitum.*"

The charge of the court placed the liability of the defendant wholly on the ground, that he was bound for the rent by force of the contract made and operative long before he was a member.— It expressly excludes the idea of his being bound by acknowledging his liability under it, or by making a new contract, either express or to be implied from occupation. It is, therefore wholly erroneous.

Bailey, for Nuckolls.

TURLEY, J. delivered the opinion of the court.

This is an action of assumpsit by the defendant in error against the plaintiff. The declaration contains three counts. The first, a special count, charging that the plaintiff in error, together with others, organized a Thespian Society for the enacting of plays, and that they rented a house for that purpose from the defendant, and agreed to pay him six dollars a month rent for every month they should so occupy it. The second, is an *indebitatus* count for work and labor done. And the third, a *quantum meruit* count for work and labor done. The proof shows, that some young gentlemen organized the society, and made the contract set forth in the first count; and that the plaintiff in error became a member of the society some months after the contract. The court was requested to charge the jury, that if the contract was made before said plaintiff became a member of the society, he was not bound by it. This the court refused, and charged, that in such a case he would not be bound for the previous, but would be for the subsequent rent, and the jury found accordingly. This charge is certainly erroneous under the state of the pleadings. If the plaintiff in error be liable at all for the rent after he became a member of the society, it is not upon a count framed upon the contract originally made, nor upon an *indebitatus* or *quantum meruit* count for work and labor done, but upon a count for use and occupation. Reverse the judgment, and remand it for a new trial.

JOHNSON vs. BROWN, SMITHERS, *et als.*

1. Brown conveyed real and personal property in trust for the benefit of creditors. Brown and Smithers, by another deed, conveyed certain other real and personal property in trust for the benefit of certain other creditors. Johnson having a judgment against Brown, and also against Brown & Smithers, partners, filed his bill against Brown, and Brown & Smithers, the trustees and creditors, to subject the property in said deeds to the satisfaction of his judgments: Held, that said bill was demurrable for multifariousness, there being no connection whatever between the creditors secured in the two deeds.

2. No principle can be extracted from the numerous cases on the subject of multifariousness, which can be adhered to as a general rule. The court must determine each case upon its own peculiar circumstances; avoiding on the one side the evil of multiplicity of suits, and on the other the evils arising out of blending in one suit, distinct and incongruous claims and liabilities.

3. Where a demurrer to a bill is sustained for multifariousness, the complainant may in the chancery court dismiss his bill as to a portion of the defendants, by the joining of whom with others the multifariousness is created, and prosecute as to the rest. Where, however, the complainant does not choose to dismiss his bill as to a portion of the defendants, on the sustaining the demurrer by the chancellor, but appeals, and the judgment is deemed correct, the supreme court will not remand, but dismiss, without prejudice to the institution of other suits.

This bill was filed in the chancery court at Brownsville, by Johnson against Brown, Smithers, and others, for the purpose of having two deeds of trust declared void, by reason of fraud, and to subject the property therein set forth to the satisfaction of judgments which Johnson had obtained against Brown, and Brown & Smithers, partners in trade. Brown, Smithers, the trustees, and the creditors for whose benefit and use the deeds were made, were all made parties defendant to the bill. The defendants filed a general demurrer, alledging multifariousness as the ground upon which it was filed. The complainant joined in demurrer.

The demurrer was argued at the November term, 1840, McCampbell, chancellor, presiding. He dismissed the bill. The complainant appealed to the supreme court.

Mumford, for the complainant, contended that the bill was not multifarious, and cited and commented upon the following authorities. Mitf. by Jeremy, 181, 182: Story Eq. Pl. 400, 408, 409: 5 Sim. Rep. 288: 2 Sim. Rep. 329: 1. Sim. & S. 61: 3 Price, 164: Story Eq. Pl. 413: 6 Mad. Rep. 89: 9 Peters, 632: 4 Cowen Rep. 688, 689, 701: 5 Paige Rep. *Boyd vs. Hoyt*: 6 Johnson Ch. Rep., *B. vs. Brown*, p. 156: Calvert, 87.

[Johnson vs. Brown, et al.]

Searcy, for the defendants.

REESE, J. delivered the opinion of the court.

The bill alleges that the complainant obtained a judgment at law against Brown for upwards of \$3000, that an execution was issued, and *nulla bona* returned thereon. That Brown, to secure creditors, had made a deed of trust, conveying to one Hill, as trustee, a large amount of real and personal property; that a sale of the property was made by the said trustee, Hill, and that various persons became purchasers at the sale of the property. The bill alleges, that the deed of trust was fraudulent and void as to complainant, and that the purchasers had notice thereof at the sale, and are affected thereby; and it prays that the said deed and sale be set aside, and that the said Brown, the said trustee, Hill, the creditors, secured by said deed, and the purchasers at the said sale, be made parties to the suit. The bill also sets forth, that the said Brown and one Smithers, are partners in trade, under the firm and style of Brown & Smithers, and that he had obtained against them a judgment at law, for a considerable sum, (which is stated,) that an execution was issued thereon, and was returned *nulla bona*. That said Brown & Smithers, to secure certain creditors of theirs, had conveyed by a deed of trust to one Clarkson, as trustee, certain property therein mentioned; that said deed of trust is fraudulent and void as to the judgments and claims of the complainant, and prays that it be set aside, and that the said Brown & Smithers, and the trustee in said deed, and the creditors secured thereby, be made parties defendant to the suit.

The defendants have all joined in demurring to the bill for multifariousness. The chancellor saw fit to sustain the demurrer and to dismiss the bill, and the complainant has appealed to this court.

Mr. Justice Story has justly remarked, that numerous as are the cases upon this subject, no principle can be extracted from them, that can be safely adhered to as a general rule, but the courts must determine each case upon its own peculiar circumstances. While multiplicity of actions on the one hand, ought to be avoided, we should be careful, on the other, to guard against that complication and confusion in the investigation of rights, and the application of remedies, arising from the attempt to blend in one suit, distinct and incongruous claims and liabilities. The interest and liability of defendants may be separate, and yet they can be joined in the

[Johnson vs. Brown, et als.]

same suit. But, then, their liability must *flow* from the same *fountain*; their interests *radiate* from some *common* centre; as if they have distinct portions of complainant's distributive share, or have purchased severally and each for himself from complainant's testator separate portions of his trust property, and in such like cases. It is upon this principle, perhaps, that the judgment in the case of *Fellows vs. Fellows*, 4 Cowen, 682, can be maintained, if at all maintainable. In that case, several persons, at distinct times and without confederation with each other, had fraudulently purchased separate portions of property of B., the debtor of A., and who had a judgment against B. It was held, that a bill filed against all, was not multifarious. B. the common and fraudulent vendor to all the defendants, was the debtor to A., and constituted a common connecting link, a central point to all. That case goes further than any of which we are aware. But it does not go far enough to vindicate the bill before us from the objection of multifariousness brought against it in the demurrer.

The complainant has a judgment at law against Brown; the latter makes a deed of trust to secure certain creditors, and a sale takes place under said deed, and there were divers purchasers of separate articles of property. If the deed of trust and the sale be fraudulent, the complainant with proper averments, may well make Brown, the trustee, the creditors intended to be secured by the deed of trust, and the purchasers at the sale which took place under it, parties defendant to the same bill; because Brown, the debtor of the complainant, is the source and origin of all their claims, the common centre, the connecting link between the complainant and all the defendants. But this ceases to be the case when you go a step further, to the judgment against the firm of Brown & Smithers; to the deed of trust to secure the creditors of the firm. When you make Smithers, the trustee in the last mentioned deed, and the creditors of the firm, parties to the same bill filed against the trustee, creditors and purchasers under the deed first set forth, there ceases to be any common centre, any one connecting link. The rights and liabilities do not spring out of or *radiate* from any *one point or person*. The creditors of the firm have no connection with the creditors and purchasers under Brown, and it would not be expedient or proper that their interests and liabilities should be involved in the same suit.

We think, therefore, that the demurrer was properly sustained;

[Copeland, et als. vs. Woods, et als.]

but we regret that the complainant did not upon the demurrer being sustained, move the chancellor to dismiss his bill as to Smithers and those claiming under the firm or partnership deed of trust, and to retain the suit as to the others. We suppose it would have been proper for the chancellor, if thus moved, so to have ordered. But as the complainant has placed himself before us upon the question raised by the demurrer, and the decree thereon, we apprehend that we are at liberty to do no more here, than to dismiss the bill, in consequence of affirming the chancellor's decree, which we reluctantly do, but without prejudice.

COPELAND, et als. vs. Woods, et als.

Dougherty, by virtue of warrant No. 284, made an entry in the office of Carroll county in 1822 and sold the land as entered to defendants. In 1825, by virtue of the same warrant he made a second entry, in the same office, on a different tract of land, leaving the first entry standing on the books of the office not vacated or withdrawn in fact, and obtained a grant on the second entry: Held, that the first entry not being in fact vacated, the land was not vacant and unappropriated land, subject to entry.

Copeland, Venable and Goodman on the 5th day of December, 1838, presented a petition to Benj. C. Totten, judge, praying that a writ of *mandamus* be directed to Woods, entry-taker for Carroll county, commanding him to receive an entry on certain land lying in said county and place the same on the books of his office. The petition states that the plaintiffs had tendered a location to the said entry-taker, accompanied with a good and valid land-warrant, to the satisfaction of which the vacant and unappropriated land south and west of the congressional reservation line was subject, and that the land contained in the tendered location was vacant.

The petitioners also stated that Woods regarded the land as not being vacant, there having been once an entry thereupon, which still stood upon the books of the entry-taker; but that the warrant had been removed, and entered in another part of the county, and the entry had been consummated by a grant. The judge ordered a *mandamus nisi* to issue, which was issued and served on Woods the entry-taker.

Porter, Edwards and others came in and were made parties de-

[Copeland, et als. vs. Woods, et als.]

fendant at the September term, 1839, and filed their several answers. They denied that the land was vacant, set up titles thereto by purchase from Dougherty and exhibited duly registered deeds of conveyance from him and claimed the benefit of their possession as secured by the act of limitations in reference to occupant claims.

Woods answered and stated that he had refused to receive the entry of petitioners, because it appeared on the books in his office, that the land had already been entered, and that the defendants were in possession of the land, and claimed it by virtue of conveyance from Dougherty, in whose name it was entered. Woods also stated, that it appeared on the books in his office, that the warrant which was laid and appropriated by Dougherty on the land proposed to be entered by petitioners, was subsequently laid and appropriated a second time, on a different tract of land, by said Dougherty, and he, not considering it his duty to declare which of the two entries was void, each standing on his books, had refused to make the tendered entry.

The cause was submitted on the facts contained in the petition and answer to his honor, Judge Totten, at the January term, 1841, who being of the opinion, that the land was vacant and unappropriated, ordered a *peremptory mandamus* to be issued. The defendants appealed in error.

Huntsman and Scurlock, for petitioners.

Fitzgerald and Williams, for defendants.

REESE, J. delivered the opinion of the court.

This is a petition for a *mandamus* filed in the circuit court of Carroll county in order to compel one of the defendants, the entry-taker for that county, to receive and enter upon his general plan, an entry by the petitioners to him tendered on the 1st day of January, 1838. The circuit court upon the facts presented in the record ordered and adjudged that a *peremptory mandamus* should issue, &c. And the defendants have appealed to this court.

The main facts upon which the controversy has arisen, and by which it must be determined, are as follows, to wit: on the 12th day of September, 1821, a certain R. E. C. Dougherty made an entry as follows, to wit: "No. 877, R. E. C. Dougherty by vir-

[Copeland, et als. vs. Woods, et als.]

tue of certificate No. 284, for 2,500 acres, issued by the commissioners of West Tennessee to Samuel Chambers and others, enters the same in 12th district, range 2 and 3, and section 4, beginning on the south-west corner of entry 253, running west" &c. This entry was placed upon the general plan and remains there still. Of the land covered by the above entry, R. E. C. Dougherty on the 8th of November, 1824, by deed of bargain and sale with covenant of general warranty, conveyed 274 acres to Henry Forest, reciting in said deed that it was part of a 2,500 acre tract granted to the said Dougherty by the State of Tennessee. And on the 1st of August, 1823, the said Dougherty by deed with like warranty conveyed 228 acres, another portion of the land covered by said entry, to R. B. Edwards, another of said defendants. On the 11th of June, 1828, he conveyed another portion of the same to the said Edwards, containing 125 acres, and on the 27th of July, 1827, he conveyed 400 acres of said entry to defendant Wm. Parker. These deeds were all duly registered.

On the 1st of January, 1825, the said Dougherty made another entry as follows, to wit: "No. 1961, State of Tennessee, 12th district, R. E. C. Dougherty by virtue of certificate No. 284, for 2,560 acres, enters the same in range 2, section 3, beginning south-west of entry No. 91," &c. The land covered by this entry lies some 5 or 6 miles from that covered by the other. On the 26th day of January, 1827, a grant from the State of Tennessee was issued to the said R. E. C. Dougherty which recited, "that by virtue of certificate No. 284, dated the 5th day of August, 1809, issued by the commissioners for West Tennessee to Samuel Cummins, jr. for 2,500 acres and entered on the 12th day of September, 1821, by No. 877, there is granted by the State of Tennessee to R. E. C. Dougherty as assignee of said Cummins a certain tract or parcel of land, containing two thousand five hundred acres by survey, bearing date the 12th day of June 1822, lying in 12th district in Carroll county in the 2nd and 3d sections of 2nd range, and bounded as follows, to wit, beginning on," &c. Here follows a local description of boundary, covering the land contained in the entry of 1825. During this time and before the first entry, the said Dougherty was surveyor general of the said 12th district. The defendants have continued since the date of their deeds, respectively in possession, occupation and cultivation of the lands conveyed thereby. For the petitioners it has been contended that

[Sanderlin vs. The State.]

the entry of the 1st of January, 1825, purporting to be upon, or by virtue of a certificate of the same number of the 12th of September, 1821, namely, No. 284, is a vacation or withdrawal of the said last mentioned entry, at all events, in legal operation and effect; and if that were not so, it is contended that the grant of 1827, although not purporting to be founded upon the entry of 1825, yet by its locative calls covering the land contained therein, extinguishes, or at least draws to it, the entry of the 12th of September, 1821; and therefore, that the land which had been covered by the last entry was vacant and unappropriated when the petitioners presented their entry to the entry-taker, on the 1st Jan., 1838. On the other side and for the defendants, it has been insisted that the entry of 1825 was not intended to vacate or withdraw the entry of 1821, because the former was not in fact vacated or withdrawn, but still remains upon the general plan of said district, and because the said entry does not pretend to be founded upon the same certificate, except merely as to the identity of the No. of the certificate, it not reciting the same warrant by reference to the assignee, and being for a different number of acres, to wit, for the amount of 2,560; and if it were intended to re-enter the same warrant and vacate the first entry, that such intention could not legally take effect, and such second entry would be null and void by the provisions of the act of 1821, ch. 31. And they deny that the grant issued in 1827 will vacate and extinguish the entry of 1821, because the said grant upon its face does not purport to be founded on the entry of 1825, but on that of 1821, referring to the latter by its date, by its quantity and by description of the warrant, and purporting to include land surveyed in 1822, prior to the entry of 1825. And they deny that because the locative calls of the grant is for other land than that entered and surveyed, that the grant, under the circumstances and by operation of law, will draw the entry and survey to itself, the locative calls of which are equally specific and distinct. But they insist on the contrary, that the entry and survey will draw the grant to them, and clothe themselves with it, it being the object of the law and of the State to confer the legal title of a grant upon those owning and entitled to the equitable estate, in the land entered, arising from the entry itself, and the survey under it; and they insist that it would be competent for them (who have been long in the possession of the land entered, and, as they insist, intended to have been granted,) by application to the proper

[Miller vs. Childress.]

court and making the proper parties, to have the calls of the grant so amended as to cover the land and conform to the calls of the entry and survey.

We are of opinion, that a controversy between the claimants under the second entry, and those under the first, as to which would be entitled to the protection of the grant to their possession, would involve, under the circumstances and for the reasons above set forth, much and serious difficulty. The claimants under the second entry are not before us in this contest, and we deem it, therefore, here improper to adjudicate upon their rights. But, for the facts, and upon the grounds, above enumerated, we are of opinion that we should not be justified, in the present aspect of the case, to determine that the land in question is vacant and unappropriated, and was subject on the 1st day of January, 1838, to the entry of the petitioners.

If the general conclusion at which we have arrived, resulting from the aspect of the whole case, needed to be fortified by minor considerations, we might add that a clear case ought to exist before the court should feel called on, by their mandate to the entry-taker to interfere with the actual possession of cultivated land, long occupied, under an entry still existing upon the general plan, and under deeds of conveyance duly registered, when we reflect with what anxiety the legislature in the 11th section of the act of 1837, ch. 1, have endeavored to perfect the possession of an occupant notwithstanding any informality, defect or omission in the certificate or probate of occupancy, or in the transfer of the same, declaring that the "possession shall bar all other claimants, and be notice against all claims or suits, legal or equitable."

And again, the 10th section of the statute just above referred to, declares "that the several county offices shall be and remain open from and after the 1st day of January, 1838," &c. The entry of the petitioners was tendered on the 1st day of January, 1838. It is very far from certain that the office was on that day open by law, for the reception of entries.

Upon the whole we are of the opinion that the judgment of the circuit court should be reversed; that the petition be dismissed, and that the defendants go hence, &c.

MACON and BAILEY vs. SHEPPARD.

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1. A benefit to a party promising, or a prejudice or trouble to the party to whom the promise is made, is a good consideration.

2. Where Washburn promised to convey land to a trustee, for the benefit of a society of Christians, upon condition that said trustee and society of Christians would erect thereupon a house for purposes of public worship. Held, that the erection of such a house on the land was a benefit to Washburn, and trouble and expense to the trustee and society, and therefore a good consideration intervened.

3. Where Washburn agreed, by parol, with a certain trustee and society of Christians, to convey an acre of land to such trustee for the benefit of said society, upon condition that they erect a house for public worship, and said society did erect the house as agreed upon, and Washburn sold and conveyed the acre of land with the tract to which it was attached to Beard, and Beard made a bond in conformity with the parol agreement: Held, that this bond was as obligatory as though it had been made by Washburn.

4. Where complainants acquire an equitable right to land, such right can be enforced against every successive vendee, who may acquire the legal right to such land with notice of complainants' equity.

5. The possession of a church by the officers thereof, for purposes of public worship, is as much an actual possession as residence on the premises by any citizen.

6. If a person purchase land of another, knowing at the time of the purchase that the land is in the possession of other persons, he is bound to enquire into their title, and is affected with notice of all facts in relation thereto.

William Macon and Laban Bailey, as trustees for the society of Christians called Baptists, filed this bill in the chancery court at Bolivar, on the 6th day of September, 1839, against William C. Sheppard, to divest him of the legal title to one acre of land in the county of Hardeman.

The bill charges, that a tract of land containing one hundred and fifty-five acres, lying in Hardeman county, was granted to Thomas Washburn. That in the year, 1825, the said Washburn agreed to convey to the society of Christians called Baptists, one acre of said land, and gave them the right of way to a spring adjoining said acre, upon the condition that the said society would erect thereupon a comfortable house for religious worship. That the said society did accordingly build a comfortable house for religious worship, and furnished it with seats. That one part of said acre of ground was selected as a burying ground, and the house was occupied from that time forward as a house of public worship, and the dead of the neighborhood buried in the place so set apart as a

[Macon, et al. vs. Sheppard.]

grave-yard. The bill further charges, that Washburn continued the owner of the tract of land until the year 1835, the house being occupied still as a place of public worship. That in the year 1835, he (Washburn) sold the tract of land of 155 acres to C. J. Beard, and that he gave a bond to Beard to convey to him the said one hundred and fifty-five acres of land, but at the same time took the bond of Beard to convey to the plaintiffs, as trustees of the Baptist society, the said acre of land on which the church was erected, the grave-yard laid off, &c., with a right of way to the spring; that this bond was lost; that afterwards Beard sold the land to Dandridge, with a reservation of the acre aforesaid, with right of way to the spring for the church; that in 1837, Dandridge sold the tract to Sheppard, and gave said Sheppard full and ample notice of the right which had been previously given by bond to the complainants as trustees of the church; that notwithstanding said notice, Sheppard had, in the latter part of the year 1839, enclosed the said church with a high fence, took out and removed the seats, and converted it into a fodder-house.

The bill prays, that the title to an acre of ground, including the church and grave-yard, be divested out of the defendant Sheppard, and vested in the complainants for the use of the society aforesaid, and that the county surveyor be directed to survey and lay off the same by metes and bounds, &c.

Sheppard filed his answer on the 13th day of December, 1839. This answer stated, that the land was granted to Washburn as stated in the bill; that as to the purchase of Beard, he knew nothing; that Washburn had executed a deed in fee simple on the 5th day of December, 1835, to Dandridge for the entire tract embraced in the grant, and that he had purchased the entire tract embraced in the grant for \$800, in May, 1837, took a deed and paid the purchase money, and that neither in the deed of Washburn to Dandridge, nor in the deed of Dandridge to himself, was there any reservation whatever for the benefit of the complainants or the church. The answer also states, that the defendant purchased without any notice whatever of the claim of complainants to this acre of land, and that he had never heard of the pretended claim of the Baptist church, till after he had received a deed from Dandridge.

The defendant also insisted in his answer, that if the bond alleged to have been made by Washburn to complainants ever had exist-

[Macon, et al. vs. Sheppard.]

ence, it was voluntary and without consideration, and that it was void against a subsequent purchaser for a valuable consideration, without notice of the alleged claim.

The plaintiffs filed a replication to this answer, and much proof was taken. It appeared that the society of the Baptist church had taken possession of the lot of ground in 1827, built a church and fitted it out as set forth in the bill, upon the understanding therein expressed; that Washburn sold the land to Beard, in 1835, and executed a bond to convey him a title, and required Beard to execute a bond for the spot in controversy to complainants as trustees for the benefit of the society; that Beard did so execute the bond; that Beard afterwards sold the entire tract to Dandridge, he getting fifty dollars advance on the amount he agreed to pay, and stipulating with Dandridge in reference to the acre. Washburn conveyed the entire tract to Dandridge, and Dandridge by deed conveyed the whole tract to Sheppard, the defendant, for \$800.—It appeared, that up to the time Sheppard took possession of the premises, in the year 1837, the house had been constantly used as a house of public worship by the society of Baptists, and that Sheppard had heard of the claim of the church previous to his purchase from Dandridge. It also appeared that Sheppard had enclosed the property in controversy by a fence, &c.

The chancellor, McCampbell, at the November term, 1840, dismissed the bill upon the hearing of the cause. The complainants appealed.

Bailey, for complainants.

Fentress and Miller, for defendant.

GREEN, J. delivered the opinion of the court.

Thomas Washburn agreed, verbally, to give the acre of ground in controversy to the Baptist church at Mount Zion, in Hardeman county, on condition that they would erect a suitable house for religious worship. A comfortable house for that purpose was erected and fitted with seats, &c., for use. In 1835, Washburn sold the tract of land upon which the said acre of ground is situated, to one C. J. Beard, reserving the acre aforesaid. Beard, in consideration of Washburn's said agreement with the church and the fulfilment of the condition aforesaid, executed a bond to the complainants, binding himself to convey said land to them as trustees

[Macon, et al. vs. Sheppard.]

for the church aforesaid. Soon after this sale, Beard sold the land to one Dandridge, who had notice of complainants right to said acre, Washburn never having conveyed the said land to Beard. By agreement among the parties he made a deed to Dandridge, Beard's vendee. In the year 1837, Dandridge sold and conveyed the same land to the defendant. There was no reservation of the acre aforesaid, either in Washburn's deed to Dandridge, or in the deed of Dandridge to the defendant. At the time defendant purchased the land, the church aforesaid were in the habit of using and occupying the house, on said acre of land, for religious worship. The title bond of Beard has been lost, and the defendant refuses to make a deed for the acre of land, and has appropriated the house, seats, &c., to his own use.

1. The first question is, whether there is any sufficient consideration for the agreement on the part of Washburn to make a conveyance for the acre of land in controversy. A valuable consideration is either a benefit to the party promising, or a prejudice, or trouble to the party to whom the promise is made. 2 Kent, 465. The erection of this house in the neighborhood, for religious worship, was a benefit to the party promising, and put those to whom the promise was made to trouble and expense. In either point of view, therefore, there was sufficient consideration.

2. The fact that the title bond was executed by Beard and not by Washburn, can make no difference. Although the contract was originally by parol, yet having afterwards been reduced to writing, it is equally obligatory as though it had been written when first made. 2 Story's Eq. 57-8.

3. The complainants having acquired an equitable right to enforce this contract as against Washburn and Beard, they have the same equity against every successive vendee with notice of their claim. 2 Story's Eq. 92, sec. 784.

4. The only question therefore is, whether the defendant is affected with notice. The evidence is, that the people of the neighborhood, constituting the Baptist church at Mount Zion, were in the habit of using this house regularly as a place of religious worship. In Martin & Yerger's Rep. 58, this court decide, that the possession of a meeting house by the officers of a church for purposes of religious worship, is as much an actual possession as residence on the premises by another individual. And it is settled, that if a person purchase an estate from the owner, knowing it to be in possession

[Williams, et al. vs. Union Bank.]

of tenants, he is bound to enquire into their estates, and is affected with notice of all the facts in relation thereto. 1 Story's Eq. 389: 5 John. Ch. Rep. 29.

Let the decree be reversed, and a decree be rendered, declaring the rights of the complainants, and directing that the county surveyor of Hardeman county lay off the said acre of land by metes and bounds, so as to include the meeting house and grave-yard, and report to the next term of this court.

WILLIAMS, CHALMERS, *et als.* vs. UNION BANK.

1. The charter of the Union Bank of the State of Tennessee is a public law and need not be given in evidence. Although the corporation may be correctly denominated a private corporation, yet the law creating it is a public law.

2. Evidence of acts of *user* is *prima facie* proof of the performance of the conditions required to be performed precedent to the time the bank was to go into operation.

3. A recognition of a bank in a public law as a legally existing corporation, is, so far as third persons are concerned, conclusive evidence of its legal existence, against which nothing can be heard in a collateral way from such third persons.

The president and directors of the Union Bank of the State of Tennessee instituted an action of assumpsit in the circuit court of Madison county, on the 2nd day of August, 1839, against Williams and Chalmers, as the makers of a promissory note for the sum of \$2,250, and against Jameson and Keats as the endorsers thereof. The plaintiffs declared in the usual form and defendants filed a joint plea of non-assumpsit. On the trial at the regular term, Judge Read, presiding, much testimony was introduced in reference to demand and notice, which it is not necessary here to set forth. The defendants offered to prove that the gold and silver, required by the charter of the Bank to have been paid by the subscribers precedent to the commencement of banking operations by the corporation, had not been paid. This testimony was rejected by the court, to which the defendants excepted.

Read, judge, charged the jury that the plea of non-assumpsit put in issue the existence of the corporation; that the plaintiffs must prove their corporate existence; that the charter granting the priv-

[Williams, et al. vs. Union Bank.]

ilege of banking and proof that it was in operation as a bank, was sufficient evidence of its corporate existence.

The jury returned a verdict in favor of the president and directors for the sum of \$2,384 damages. A motion for a new trial was made, but overruled, and judgment rendered in conformity with the verdict. The defendants appealed in error to the supreme court.

P. M. Miller, for plaintiffs in error.

McCorry, for defendants in error.

GREEN, J. delivered the opinion of the court.

The court is of the opinion that the charter of the Union Bank of this State is a public law, and need not be given in evidence.

1. A bank is created upon public considerations, to subserve public ends, and not for private purposes only. Its notes are intended to constitute the currency of the country, thereby becoming a medium of exchange for the public benefit. The profits that the stockholders may receive are incidental, but are not the primary object in passing the charter. Although, therefore, the corporation may be correctly denominated a private corporation, yet the law creating it is a public law.

2. Evidence of *user* under the charter is *prima facie* proof that the conditions which the charter required to be performed, precedent to the time that the bank was to go into operation, have been performed.

3. Repeated recognitions by the legislature, in various public laws, of the Union Bank as a legally existing corporation, is so far as third persons are concerned, conclusive evidence of such legal existence, against which, in this collateral way, no evidence of the non-fulfilment of the conditions upon which such legal existence was made dependant by the charter can be heard. Let the judgment be affirmed.

ALTON, DEWY & TAILOR vs. MARY ROBINSON, Ex'x.

If the holder of a promissory note wish to render the estate of a deceased testator liable on his endorsement, he must give notice of his intention to look to the estate for payment, as in other cases, though the executor of the estate be the maker of the note.

D. Vaught executed a bill single to Thomas Robinson, binding himself to pay him \$3149 85. Robinson endorsed the instrument to Alton, Dewy & Tailor, and died before the maturity of the same. Vaught, the maker of the note, and Mary Robinson, were appointed executor and executrix of the will of Robinson, and Vaught was co-executor at the time of the maturity of the obligation, but renounced, and was released, before this action was commenced. No demand was made, or notice of default given, for some five or six weeks after the bill single fell due.

Alton, Dewy & Tailor instituted an action on the case in the circuit court of Tipton county, on the 23d May, 1839, against Mary Robinson, sole executrix, on the endorsement of Thomas Robinson, deceased.

The cause was submitted to the jury on the plea of non-assumpsit, and the court, Dunlap, judge, presiding, charged the jury, that regular notice was required by law to have been given to executor and executrix, as in other cases, that the plaintiffs intended to look to the estate of Thomas Robinson, deceased, for the payment of the bill single, and that the fact that Vaught, the maker of the note, was executor at the time the notice should have been given, did not dispense with the notice.

The jury rendered a verdict for the defendant. A motion was made to set the same aside, which was overruled, and judgment rendered. The plaintiffs appealed in error to this court.

H. G. Smith, for plaintiffs. The facts are: D. Vaught made his single bill, payable to Thomas Robinson, who endorsed it to the plaintiffs. Before the maturity of the bill, Robinson died. His will made Vaught and Mary Robinson his executor and executrix. The bill was not presented for payment, and notice of default given, until five or six weeks after it fell due. At the time of the maturity of the bill, Vaught was an acting executor on the estate of the deceased. Subsequently he resigned his office of executor, and this suit was brought against the defendant Mary Robinson, alone, as executrix of Thomas Robinson the endorser.

[Alton, et als. vs. Mary Robinson.]

The court directed the jury, that the plaintiffs ought not to have a verdict, unless they showed that payment of the bill was demanded of Vaught on the day it fell due.

Neither demand of payment, nor notice of default was necessary to fix the liability on the endorsement.

Demand is immaterial, where notice of default is unnecessary. The object of demand and notice, is to afford the endorser an opportunity to obtain security from those persons to whom he is entitled to resort for indemnity. 3 Kent Com. 105. Such object does not exist where the maker and endorser is the same person. The reason of demand and notice failing, the necessity fails.

This is clear, where the maker and endorser is the same person, and liable in both characters in the same right. It seems equally clear where the maker is at the maturity of the note the executor of the endorser. As maker he is in default without demand; as executor of the endorser he is apprised of the default without notice. To demand payment of Dan Vaught *sui juris* for the purpose of apprising him as executor of the default, to enable him as executor to obtain indemnity from himself as maker, is absurd in the statement, and would be nugatory in fact.

The result does not appear to be varied by there being a co-executor joined with the maker. Demand of payment of one of several joint makers, and notice of default given to one of several joint endorsers, is sufficient to fix the liability of all the endorsers. Byles on Bills, 166: 3 Kent Com. 105. And so demand of, and notice to one of several persons composing a co-partnership is sufficient; *ibid.* And, so, if one of several drawers be also acceptor, notice to the other drawers is unnecessary. 1 Camp. 82, 404: 12 East, 317, 322, 323: 1 M. & S. 259: Ch. on Bills, 370.

The resignation of the executorship by Vaught subsequent to the maturity of the note, is immaterial. The liability of the representatives of the endorser being once fixed, cannot be discharged by a change of the persons forming the representative character.

On a subsequent day, Mr. Smith said:

As late as the last edition of Chitty on Bills, no judicial determination had been made in England, that notice of default of payment was necessary to be given to the executor of an endorser. Chitty on Bills, 529, *n. k.* Nor can I find any American decision to the same point. 17 John. Rep. referred to by Chitty, does not decide this.

[Alton, et als. vs. Mary Robinson.]

Chitty and other elementary writers say, that notice to the executor of the endorser is necessary. And this is reasonable.

Co-executors are regarded in law as an individual person. They have a joint and entire interest in the testator's effects which is incapable of being divided, and in case of death such interest vests in the survivor. Tol. on Ex'rs, 243.

Each executor has the control of the estate, and may release, pay or transfer without the agency of the other. Per Kent, 11 John. Rep. 21.

The sale or gift of one, is the sale or gift of all. 2 Williams on Ex'rs, 621.

These cases and principles show the unity of character of several executors.

J. W. Harris, for defendant. If payment is not made upon demand of the maker, and notice given to endorsers, they will be discharged from their liabilities. Chitty on Bills, 465.

If the endorser be dead, notice should be given to the executor or administrator. Chitty on Bills, 369, top page: also page 529: 17 John. Rep. p. 25.

It is incumbent on the holder to prove distinctly, and by positive evidence, that due notice was given to the party sued, and this cannot be left to inference or presumption. Chitty on Bills, 511, top page.

And the endorser is entitled to notice, although the drawer and acceptor are fictitious. Chitty on Bills, bottom page, 529.

The endorser is entitled to strict notice. 20 John. Rep. 20.

The death, bankruptcy, or known insolvency of the drawer, or his being in prison, constitute no excuse, either in law or equity, for the neglect to give notice of non-acceptance or non-payment, &c. And it is not competent for the holders to show that delay in giving notice was not prejudicial. Chitty on Bills, 360.

Notoriety of the insolvency of the drawer, as in the case of bankruptcy, constitutes no cause for the neglect of the holder to give notice of non-acceptance to drawer and endorsers; and it appears to have been considered, that such notice must come from the holder, and that it will not suffice, if it comes from any other party, because the object of the notice is not merely that the parties may immediately call on those who are liable to them for indemnity, but it must import the holder intends to stand on his legal rights,

[Alton, et als. vs. Mary Robinson.]

and resort to them for payment; and, therefore, where the drawer having notice before the bill was due, that the acceptor had failed, gave another person money to pay the bill, and the holder neglected to give notice of the dishonor, it was holden the drawer was discharged. Chitty on Bills, 368, bottom page. See Chitty on Bills, 530, and in note (†).

REESE, J. delivered the opinion of the court.

The only question in this case is, whether if the maker of a note, at the time of its maturity be the executor of the endorser, the holder is bound, in order to make the estate of the testator liable, to demand payment of the maker, and upon his default, to give him notice as executor, that he will look to the estate of the testator for payment. And we think it very clear that such notice is necessary. It is argued that the *executor* in such cases *knows* that he as *maker* has not paid. Certainly he does. But he does not know that it is the purpose of the holder to resort to the estate of his testator for payment. There is but one mode in which, according to law, knowledge of this can be brought home to him; namely, the usual notice from the holder. In ordinary cases, personal knowledge on the part of the endorser, that the maker has made default in payment, will not supply the want of the notice required by the law merchant; neither will it in this case: knowledge is not notice. For it is held, that the endorser is entitled to notice, although the drawer and acceptor are fictitious. Chitty on Bills, 529. So the death, bankruptcy, notorious insolvency, or the being in prison of the drawer or maker, constitute no exemption to the holder from the necessity of giving notice to the endorser of the default of such drawer or maker. That no injury was produced by the want of notice, and no indemnity attainable, if it had been given, can furnish no proper ground for its omission; and the reason is this: the endorser is not directly liable on the mere ground of his having endorsed. The law creates for him a conditional liability, and implies a contingent promise, that if default be made by the maker, and due notice of such default be given to him, he will pay. Notice, then, is an element in this implied contract, as important as the default itself; both must exist, or the endorser, not directly and primarily liable on his endorsement, never becomes so by operation of law. For these reasons, we think there is no error in the judgment of the circuit court, and we therefore affirm it.

THE UNION BANK *vs.* CARR and BOYERS.

1. On the trial of an action of assumpsit against the endorser of a bill of exchange: Held, that the plaintiff had the right to strike out the name of an endorsee and insert his own name upon proof made that the bill of exchange belonged to plaintiff, and that it was made payable to said endorsee, for the purpose of facilitating the safe transmission of the bill, and the collection thereof.

2. A writ of error will not lie from a voluntary non-suit.

The President, Directors & Co. of the Union Bank of Tennessee, instituted this action of assumpsit in the circuit court of Shelby county, on the 16th day of September, 1839, against Carr and Boyers, the drawer and endorser of a bill of exchange. They pleaded non-assumpsit, and on the trial introduced a bill of exchange in the following words:

“MEMPHIS, June 5th, 1838.

“Seven months after date of this my first of exchange, and second of the same tenor and date unpaid, pay to the order of Carr & Wood, two thousand five hundred dollars for value received, and charge the same to account of

CARR & WOOD.

To Messrs. T. F. Wood & Sinnatt,

New Orleans.”

This bill was endorsed,

“Pay to H. L. Douglass, or order.

CARR & WOOD.

Pay to Boyers & Saffarans.

H. L. DOUGLASS.

Pay to W. S. Pickett, or order.

BOYERS & SAFFARANS.”

The plaintiffs moved the court to strike out the words “W. S. Pickett, or order,” with a view to insert the name of plaintiffs, upon proof that the plaintiffs were the owners of the bill.

But the court, Dunlap, judge, presiding, refused to permit the same to be done. The plaintiffs, thereupon, took a non-suit, and at a subsequent day of the term, moved the court to set aside the non-suit upon proof made by affidavit and deposition, that the President, Directors & Co., of the Union Bank of the State of Tennessee, were the owners of the bill of exchange, and that they had procured the endorsement of the said bill of exchange to said W. S. Pickett, for the purpose of more safely transmitting and collecting the said bill of exchange. But the court refused to set aside the non-suit.

[Union Bank vs. Carr, et al.]

The plaintiffs appealed in error to this court.

Wheatly, for plaintiffs in error.

Leath, for defendants in error.

GREEN, J. delivered the opinion of the court.

This is an action of assumpsit brought by the plaintiffs in error against defendants as endorsers of a bill of exchange. The bill endorsed, as in the record, was purchased or discounted by the plaintiffs shortly after its date. Upon the trial in the circuit court of Shelby county, the plaintiffs proposed to strike out the endorsement to W. S. Pickett, assistant Cashier of the bank, and make it payable to themselves, upon proving that the endorsement to him was made only for the purpose of facilitating and rendering safe, the transmission of the bill to New Orleans for collection, where it was payable, and that in fact the bill belonged to them, though it was specially endorsed to Pickett. The court below would not permit this to be done, for the reason, that the endorsement in full to Pickett vested the legal interest and property in the bill in him; and that, therefore, no suit could be maintained upon it except in his name or by his assignee. Plaintiffs thereupon took a non-suit, and afterwards moved to set it aside, which the circuit court refused to do, but gave judgment against the plaintiffs for costs, from which this appeal is prosecuted.

We think the court erred in not allowing the endorsement to be stricken out, and changed as proposed, and consequently, in not setting aside the non-suit. The law is clearly in favor of the right of a plaintiff, or any *bona fide* holder of a negotiable instrument, to strike out and change an endorsement upon it, made under the circumstances and for the purposes shown in this case. See 18th John. Rep. 230: Chitty on Bills, 257, and note: 4 Peters Con. Rep. 223: 7 Yerg. 477. But we have, heretofore, determined that a writ of error would not lie from the judgment of a circuit court, refusing to set aside a voluntary non-suit. 6 Yerger.

This court, therefore, refusing to take jurisdiction of such case, let this cause be stricken from the docket, and judgment for costs entered against the plaintiffs in error and their security in the appeal.

STEPHEN SNELL vs. THE STATE.

In an indictment for forging a receipt, it is not necessary that it should be averred, that the person charged with the offence, is indebted to the individual against whom the receipt is forged, in order to show that the latter stands in a situation to be defrauded by the former.

At the March term, 1840, the grand jury of the county of Henderson returned into court a bill of indictment against Stephen Snell in the following words:

“State of Tennessee, }
 Henderson county, } Circuit court, March term, 1840.

The grand jurors of the State of Tennessee, elected, empannelled, sworn and charged to enquire in and for the body of the county of Henderson aforesaid, upon their oaths present, that, Stephen Snell, late of the county of Henderson aforesaid, on the 1st day of March, in the year of our Lord one thousand eight hundred and thirty-nine, with force and arms in the county aforesaid, feloniously and fraudulently did forge a certain receipt, which said forged receipt is in words and figures following, to wit:

“Received of Stephen Snell, sheriff and tax collector, sixteen hundred dollars and ninety-five cents, part of the revenue for 1836, 7. HEZEKIAH BRADBERRY, *Trustee for Henderson Co. Ten;*” which said forged receipt is in the possession of some one to the jurors unknown, with intent to defraud one Hezekiah Bradberry, trustee of the county of Henderson, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State.

And the jurors aforesaid, upon their oaths aforesaid, further present, that, said Stephen Snell, late of said county, yeoman, afterwards, to wit, on the day and year aforesaid, at the county aforesaid, with force and arms, feloniously and fraudulently did offer, utter, dispose of and put off a certain other forged receipt and acquittance for money, which said last mentioned forged acquittance and receipt for money, is in the words and figures following, to wit:

“Received of Stephen Snell, sheriff and tax-collector, sixteen hundred dollars and seventy-three cents, part of the revenue for 1836,—7. HEZEKIAH BRADBERRY, *Trustee for Henderson Co. Ten;*” which said receipt is in the possession of, or has been destroyed by the said Stephen Snell, with intent to defraud the said Hezekiah

[Snell vs. The State.]

Bradberry, trustee of Henderson county aforesaid, he, the said Stephen Snell, at the time he so offered, uttered, disposed of and put off the said last mentioned forged receipt and acquittance for money as aforesaid, then and there, well knowing the same to be forged, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State."

The third count, substantially in the form above set forth, charged that Snell was lawfully possessed of a genuine receipt executed by Bradberry as Trustee of Henderson county, to said Snell, as sheriff and tax-collector, for six hundred dollars and seventy-three cents, for the year 1836, and that Snell forged and uttered this genuine receipt so as to make it read sixteen hundred dollars and seventy-three cents, part of the revenue for the years 1836 and 7, with intent to defraud Bradberry.

The defendant pleaded not guilty and issue was taken thereupon. He was found guilty, by a jury of Henderson county, and his term of imprisonment in the jail and penitentiary house of the State fixed at three years.

The defendant moved the court in arrest of judgment, but his Honor, William C. Dunlap, presiding judge, overruled the motion, and passed sentence upon him in conformity with the finding of the jury. From this judgment the defendant appealed in error to this court.

Huntsman & McLanahan, for plaintiff in error. The judgment should be arrested, because,

1. It is not substantially averred in the indictment that Bradberry was the lawful Trustee of the county of Henderson for the years 1836 and 1837, and in consequence thereof duly authorised to receive and give a receipt for the county taxes for said years to the sheriff and tax-collector.

2. It is not substantially averred that said defendant was the sheriff and collector of the county taxes in said county of Henderson in the said years of 1836 and 7.

3. The indictment does not set out and show, in what manner the defendant was bound to pay said Bradberry any money, or that he owed said Bradberry any money, either as trustee or otherwise.

Attorney General, for the State.

[Snell vs. The State.]

RESEN, J. delivered the opinion of the court.

This is an indictment for forgery. The forged instrument, as set out, is a receipt or acquittance in the following words, to wit: "Received of Stephen Snell, sheriff and tax-collector, sixteen hundred dollars and seventy-three cents, part of the revenue for 1836 and 1837. H. BRADBERRY, Trustee for Henderson county, Ten." The first count avers that the defendant forged the above instrument with intent to defraud the above mentioned H. Bradberry; the second count, that he uttered and passed the above forged instrument, knowing it to have been forged, with intent to defraud, &c.; and the third count that he feloniously altered a genuine receipt and acquittance as follows, to wit: "Received of Stephen Snell, Sheriff and tax-collector, six hundred dollars and seventy-three cents; part of the revenue for 1836. H. BRADBERRY, Trustee for Henderson county, Ten.," to read as above set forth, with the like fraudulent intent. The defendant was convicted on all the counts, and has prosecuted his appeal to this court, and here the grounds of error assigned on his behalf, in argument, are, that the indictment does not show that he was sheriff and tax-collector for Henderson county for the years 1836 and 7; or that Bradberry was trustee in these years for that county, or was entitled to claim or demand money of the defendant on any ground. The indictment alleges, the forgery, and the alteration of the acquittance; and that they were with intent to defraud Bradberry. But this, it is said, is not sufficient. The objections, taken together, amount to this, that a liability, personal or official on the part of defendant to pay money to Bradberry should have been alleged in the indictment, in order to show that the latter was in a situation, or stood in a relation to the prisoner, so as to be defrauded by the false making of the instrument. But certainly this assumption is founded in error; for the liability of Bradberry to be injured and defrauded by the false making of the instrument, is not confined to the case of the prisoner's indebtedness to him, for upon the supposition of non-indebtedness, he would be liable to the claim and action of the prisoner for the money acknowledged to have been received. It is believed not to be necessary in an indictment for forgery, to show the various modes in which the false instrument might be used so as to injure and defraud the person who purports to have made it. It has been holden that it is sufficient to aver a general

[Rigs, et als. vs. Cage.]

intent to defraud a certain person, which intention may be made out by the facts in evidence at the trial. 2 Russell on Crimes: 1. Leach 77.

The case of *Rice vs. The State*, 1 Yer., has been referred to as sustaining the views of prisoner's counsel; a slight intimation of an opinion is there given that the indebtedness of the prisoner to the person purporting to have made the receipt, should have been alleged. But that point was not decided. The case went off on another ground. In the case of *Walton vs. The State*, 6 Yer. 377, the decision was made to turn upon the form and character of the instrument; and the case, whether rightly decided or not, does not bear upon the one before us. Upon the whole, we are of opinion there is no error in the record, and we affirm the judgment.

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RIGGS, AERTSON & SON vs. CAGE, ADM'R.

The death of the principal is an absolute and instantaneous revocation of the authority of an agent, and all acts done by the agent after the death of the principal, though done in good faith, and in ignorance of the death of the principal, are void.

William Cage and Marcus Cage were merchants and partners in trade in Lagrange, Tennessee. They constituted Bledsoe their agent to purchase goods for them in Philadelphia. William Cage died about the middle of August, 1836. Before a knowledge of this event reached Bledsoe, he had purchased of Rigs, Aertson & Son, merchants and partners in Philadelphia, goods, wares and merchandise of the value of \$425. The death of William Cage was also unknown to Rigs, Aertson & Son at the time of sale. The goods were shipped and received by the surviving partner, M. Cage, and by him appropriated.

On the 1st day of September, 1836, after the death of W. Cage, Marcus Cage executed and delivered to Rigs, Aertson & Son, a promissory note for the sum due, to wit, \$425, payable six months after date, acknowledging value received, and signed "William Cage & Co."

James D. Cage administered upon the estate of William Cage. On the 27th day of June, 1839, Rigs, Aertson & Son instituted an action of assumpsit in the circuit court of Fayette county

[Rigs, et als. vs. Cage.]

against James D. Cage, administrator of William Cage deceased. Plaintiffs' declaration contained two counts; the first, on the note, and the second for goods, wares and merchandise sold and delivered. The defendant pleaded *non detinet* and *non est factum* to the first count, and *non-assumpsit* to the second.

Upon these pleas issues were made up, and they were submitted to a jury upon the above facts at the September term, 1840. Bailey, special judge, charged the jury that the death of a partner, *ipso facto*, dissolved the partnership; that Bledsoe's agency terminated at the death of William Cage, and if the goods were sold and delivered to the agent after the death of the principal, the administrator was not chargeable with the value, and the ignorance of the vendors, and of the agent, of the death of W. Cage, at the time of the sale, could not alter the result.

The jury returned a verdict for defendant, upon which judgment was rendered, a motion for a new trial having been overruled. Plaintiffs appealed in error.

McLanahan, for Rigs, Aertson & Son.

Searcy, for Cage.

GREEN, J. delivered the opinion of the court.

The only question in this case is, do the acts of an agent performed after the death of the principal, in pursuance of authority previously given, and in ignorance of the death of the principal, bind the representative of the latter?

The general principal of the common law is, that an authority conferred by letter of attorney, must be executed during the life of the principal. 1 Bac. Ab. Tit. Authority E. The death of the principal is an instantaneous and absolute revocation of the authority of the agent, unless the power be coupled with an interest. 2 Kent's Com. 645.

In this case, William Cage, the defendant's intestate, was dead when the goods were purchased in Philadelphia by Bledsoe the agent. They have never come into the hands of the administrator, but were received by the surviving partner and appropriated by him. Let the judgment be affirmed.

TREZEVANT vs. McNEAL.

In an action instituted in the name of Trezevant on a covenant executed by McNeal to Trezevant, McNeal pleaded that Trezevant had assigned and transferred the covenant to one G. H. Wyatt, and that Wyatt was the true owner thereof; Trezevant demurred: Held by the court, that the demurrer admitted the fact, that plaintiff had no interest in the note, and the suit was, therefore, wrongfully prosecuted: Held, that a replication by the plaintiff, averring that the suit was prosecuted for the benefit of Wyatt, would have been a good answer to defendant's plea.

L. C. Trezevant instituted an action of covenant in the circuit court of Fayette county, on the 27th January, 1840, against A. McNeal, on an obligation in the following words:

“\$5,500.

“For value received, we promised to pay Lewis C. Trezevant five thousand five hundred dollars, on or before the 1st day of January, 1836, in current bank notes. Witness our hands and seals, this 1st day of January, 1836.

ALEXANDER McNEAL, [Seal.]

H. THORNTON, [Seal.]”

McNeal cravedoyer of this obligation, and set it out as above set forth and pleaded, that “after the making of said covenant, to wit, on the 1st day of September, 1836, at the county aforesaid, the said plaintiff endorsed, assigned and delivered the said covenant to a certain George H. Wyatt, who from thence and ever since said assignment, was and now is the holder of said covenant, and the legal owner of the same, and that the same never has been transferred or re-delivered to the said Lewis C. Trezevant since the said assignment, but is and was at the commencement of this suit the property of said George H. Wyatt.”

To this plea the plaintiff demurred, and at the January term, 1841, Dunlap, judge, presiding, overruled the demurrer and gave judgment for the defendant.

From this judgment the plaintiff, Lewis C. Trezevant, appealed in error to this court.

Potts, for plaintiff in error, contended that the demurrer to defendant's plea, ought to have been sustained. It has been repeatedly held in this court, that a suit may be maintained, both upon negotiable and unnegotiable instruments, in the name of one person for the use of another. See 3 Hay. 105: *Vincent vs. Groom*,

[Trezevant vs. McNeal.]

1 Yerg. 430: *Burton vs. Dees*, 4 Yerg. 4: *Cage vs. Foster*, 5 Yerg. 261. None of these cases have fully decided the question contended for in this case, to wit, that the transferee of a covenant made assignable by the act of our legislature may maintain an action in the name of the assignor, yet the general reasoning of the court seems applicable. In support of this position, see *Raymond vs. Johnson*, 11 Johnson, 488: *Alsop vs. Cains*, 10 Johnson, 400. In the first case it is decided, that when an action is brought in the name of the assignor by the assignee, the assignee cannot avail himself of the want of interest in the plaintiff; the very case now under consideration. It is decided in *Gage vs. Randall*, 15 Wend. 640, that the holder of negotiable paper may bring an action upon it, in the name of a person having no interest in it, and that it was no defence, that the suit was brought without the knowledge or authority of the nominal plaintiff.

A. Miller, for defendant, cited and commented upon 15 John. Rep. 249: 15 Wend. 640: 11 Wend. 27.

GREEN, J. delivered the opinion of the court.

This is an action of covenant upon a writing obligatory, executed by the defendant to the plaintiff, for five thousand five hundred dollars, in current bank notes.

The first plea of the defendant alleges, that before the commencement of the suit, the plaintiff assigned the said covenant to one George H. Wyatt, and delivered the covenant to him, and that he is the true and legal owner and possessor thereof. To this plea, the plaintiff demurred.

There were several other pleas to which there were demurrers; some of which were overruled, and some of them sustained; but it is unnecessary to notice any of them, as the decision in the cause must turn upon the question which is raised upon the first plea above set out. The court gave judgment for the defendant, from which the plaintiff appealed in error to this court.

The plea in this case states, that the covenant was assigned to Wyatt, and delivered to him, and thus sets out an endorsement in full. In such case the legal interest of the payee is transferred to the person named in the assignment. Chitty on Bills, 116, 117, 118: 15 John. Rep. 249.

It is true, this does not preclude the legal owner from suing in

[Chester vs. Hubbard, et al.]

the name of the payee for his benefit. 11 John. Rep. 52: 15 Wendell Rep. 640. But it must appear that the suit is for the benefit of the legal owner. And that fact should have been replied to in the defendant's plea, and would have constituted a good answer to it. 11 Wend. Rep. 27: 15 Wind. Rep. 641. But instead of replying, the plaintiff has chosen to demur. The fact is thus admitted, that the plaintiff has no interest in the covenant sued on; and we are left to the inference, that he is prosecuting the suit for his own benefit. This cannot be done. 11 Wend. Rep. 27: 15 Wend. Rep. 641.

The judgment must be affirmed.

R. I. CHESTER vs. HUBBARD and ANDERSON.

1. Where an act of the assembly provided that the office of entry-taker should be open for the reception of entries from and after the 1st day of January, 1838, until the 1st day of January, 1839, it seems, that the office is not open for the reception of entries on the said 1st day of January, 1839.

2. The 11th section of the act of 1837-8, protects a possession of three years against an entry by a warrant holder, though the possessor may not be able to produce legal proof of an occupant claim or of the assignment thereof to himself.

3. The statute of 1837-8, ch. provides that the office of entry-taker shall be open for the reception of general entries by warrant until the 1st day of January, 1839, and also provides that an occupant shall be allowed till the 1st day of January, 1839, to prove his occupancy and spread it upon the general plan indicating the land as appropriated: Held, that the occupant would be entitled to the last moment the office was open for the probate of his occupancy, and that there was no period of time at which the entry-taker could legally receive an entry by warrant holder upon the land.

Robert I. Chester filed his petition for a *mandamus* against Hubbard, entry-taker of Haywood county, in the circuit court of Haywood county, on the 1st day of October, 1839, to compel the entry-taker to receive an entry upon land lying in said county of Haywood. Chester was the holder of a North Carolina land warrant, to the satisfaction of which, the vacant and unappropriated land lying south and west of the congressional reservation line was subject. The petition states, that the land was vacant and unappropriated; that he had tendered to him on the 1st of January, 1839, an entry and warrant, and that the entry-taker had ille-

[Chester vs. Hubbard, et al.]

gally and improperly refused to receive his entry and spread the same upon the general plan of the entered and appropriated lands of the county of Haywood.

The entry-taker, Hubbard, being served with process, appeared and answered, stating, that he had refused to receive the entry, and that he had refused, because the land was previously "possessed and claimed by an occupant."

Anderson was permitted to be made a party defendant, he claiming the right of occupancy under the statutes of the State. His answer was filed at the February term, 1840, from which, and the testimony in the case, it appeared that in 1829 one Samuel Allen settled upon this tract of land, it being then regarded as vacant and unappropriated by all. Allen built houses upon it, cleared some fifty or sixty acres and remained in possession of it until March, 1834. At this time he sold the possession to defendant Anderson. Allen then deposited in the office of entry-taker a location containing therein according to certificate of survey, about 200 acres of land. On this location there were endorsed the following words: "Transferred by assignment to H. J. Anderson, March 19th, 1834."

Anderson took possession of the land by virtue of the purchase, having paid Allen \$150 therefor, and continued to reside upon it till the filing of petition. The defendant, Anderson, in his answer insists that the act of the general assembly passed in 1836, ch. 45, sec. 12, and the act of 1837, ch. 1, sec. 11, secured to him a good and perfect right of occupancy to 200 acres of land, and prays the benefit thereof in as full a manner as if formally pleaded. The defendant, Anderson, also insists that the office was not open on the 1st day of January, 1839, for the reception of entries by warrant.

The plaintiff filed a general replication to these answers, and at the January term, 1840, the cause came on to be heard before the Honorable J. Read, judge. The petition was dismissed. From this judgment the petitioner appeals in error.

Scurlock, for petitioner.

Loving, for the defendants. The act of assembly, passed 1837-8, (chap. 1, sec. 9,) under which petitioner was authorized to enter his warrant, does not authorize entries to be made unless the land is vacant and unpossessed by any one, and expressly provides that no

[Cheser vs. Hubbard, et al.]

warrant or certificate-holder shall interfere with any occupant claim, and that the whole of said warrant or certificate, or part of warrant, shall be entered in the same county.

It is objected by the defendants that the petitioner had no right or law for making the entry he proposed. First, because he does interfere with the occupant claim of H. J. Anderson, the assignee of Samuel Allen; and second, because his (petitioner's) warrant or certificate is for 274 acres of land, and the petitioner only proposed to enter 200 in the county of Haywood without showing what disposition would be made of, or where, and in what county he would enter the remaining 74 acres, and until that was done the entry-taker had no right to receive the entry for the 200 acres.

It is further objected by the defendants. that the petitioner did not present his entry to the entry-taker until the 1st day of January, 1839, when, by the law (the said act of 1837-8,) the entry-takers' offices were all closed; and we cite the 10th section of said act in proof of this position.

This section, declares that the several county offices shall be and remain open from and after the first day of January, 1838, until the 1st day of January, 1839 for the purpose of making entries, and on which last mentioned day, the several offices shall be finally and forever closed.

It will doubtless be insisted by petitioner's counsel, that that the petitioner had the right to tender his entry on the 1st day of January, 1839, and that the entry-taker was bound to receive entries on that day.

We cannot conceive that the statute intended that any entries were to be made on that day, and although to persons not familiar with the rule laid down in law in counting time, it would seem that entries might be made, and the office closed on the same day, (there being time enough,) yet where the law knows of no fraction of a day, we must conclude, that, all entries shall have been tendered before the 1st day of January, 1839, and on that day the office closed; for if it be conceded that the entry-taker was bound to receive entries on the 1st day of January, 1839, the law knows no time of that day when he could refuse, and the statute fixing none, the consequence would be that the office would have to remain open the entire day, and therefore could not be closed until the 2nd day of January, 1839, when the statute requires that it shall close on the 1st day.

[Chester vs. Hubbard, et al.]

We insist that the legislature intended that no entry should be made on the 1st day of January, 1839, according to the strict legal interpretation of the act, and refer to the act of 1836, ch. sec. 14, upon the same subject, where the legislature intended by that act that entries should be made on the 1st day of October, 1837, the day on which the office was to be closed. That section reads thus, "and all persons failing to present their claims, &c. on or before the 1st day of October, 1837, shall be barred," &c.

And defendants further insist and rely upon the statute of 1837, 8, ch. 1, sec. 11, to protect the defendant Anderson, as the assignee of Samuel Allen, in the possession of the occupancy which he has had for some six or seven years, to say nothing at present of the previous possession by Allen from 1829.

The 11th section of the act of 1837-8, provides for all occupants and their assignees where they have heretofore had, or may hereafter have the peaceable possession of the same for three years, and that no advantage shall be taken of them by reason of any informality, defect or omission in the certificate or probate of occupancy, or in transferring or assigning the same. But the said possession shall bar all other claimants and be notice against all claims or suits, legal or equitable.

It will be seen that this section does forbid any one to take advantage of any defect of an occupant claim, and provides that the possession shall bar all other claimants and be notice against all suits, legal or equitable. Upon what ground then does the petitioner ask the entry-taker to receive his entry? surely not because the land proposed to be entered by him was vacant and unpossessed; for when he called on the entry-taker to tender his entry, the entry-taker refused (according to the answer of the entry-taker) to receive it, because he considered the land previously possessed.

Where did the petitioner get his information that the land was vacant and subject to his entry? Not from having seen himself that the land was vacant; not that any one told him so, for there is no such proof; but on the contrary the proof in the case shows that Allen settled the land in controversy as an occupancy in the year 1829, and that he continued in the possession until he sold it to defendant Anderson, who has held and possessed the same, as assignee of Allen, ever since, and has had a good portion of it in cultivation. Nor did petitioner derive his information that the land was

[Chester vs. Hubbard, et al.]

vacant from an examination of the entry-taker's books, but on the contrary, upon an examination of the books there was the land spread upon the books as an occupancy in the name of Samuel Allen in the year 1829, and transferred by him in 1834 to Harrod J. Anderson, one of the defendants, who has constantly had the same in possession since that time.

With these facts before us, we must conclude, that petitioner has not made an effort to enter the land in controversy from any belief that it was really vacant and unpossessed, but from the belief that there was some defect or informality in the certificate or probate of said occupancy or in the assignment thereof; and indeed the petitioner throws out such idea in his petition, when he speaks of the reasons given by the entry-taker for not receiving his entry.

Defendant Anderson insists, that if there is any defect or informality in the certificate or probate of occupancy, or any defect or informality in transferring or assigning the same to him, that all persons are expressly prohibited by the 11th section of the act of 1837-8, from taking any advantage of it, and that the possession of the occupancy in the first instance by Samuel Allen, in 1829, and his transfer to him in 1834, and possession as assignee of Allen since, is a bar to all claimants and is notice against all claims or suits, legal or equitable, and claims to be protected in his possession under and by virtue of said act.

The proof shows beyond all doubt the settling of the land in dispute in the year 1829 by Samuel Allen as an occupancy; that he remained in the possession until he sold to Anderson; that Anderson gave Allen \$150 for it; that Allen delivered up the possession to Anderson, and that Anderson has constantly ever since had it in his possession, and that he has been cultivating about fifty or sixty acres, and the answer of Hubbard, the entry-taker, shows that the land in dispute is entered on his books as an occupancy and was previously possessed, and he therefore refused to receive the entry of the petitioner. And defendant Anderson insists, with all these facts on his side, the law already referred to will surely protect him in his possession against the claim of the petitioner who had full notice of it, and is therefore barred from having and maintaining his suit, &c.

TURLEY, J. delivered the opinion of the court.

The plaintiff in error, Robert I. Chester, on the 1st day of Jan-

[Chester vs. Hubbard, et als.]

uary, 1839, tendered to James Hubbard, the entry-taker of Haywood county, an entry for two hundred acres of land founded on warrant No. 3643, for two hundred and sixty-four acres which was refused; he filed his petition for writ of *mandamus* for the purpose of compelling its reception. The defendant, Anderson, claiming a right of occupancy in the land sought to be entered, was permitted to defend jointly with Hubbard.

Hubbard answers, that he refused the entry because he believed the land was possessed by an occupant. Anderson answers and says, that he claims the land by virtue of an assignment of an occupancy from one Samuel Allen, made to him on the 3d of March, 1834, under which he then took possession, and has remained in possession ever since. He further says that the entry-taker's office was closed by operation of law when the entry was tendered by the plaintiff; that the entry-taker had no power to receive, and therefore acted correctly in refusing it. The proof shows that the defendant, Anderson, did purchase the occupancy from Allen as he alleges, and that he has been in actual possession of it ever since. There is no proof showing that the occupancy of Allen was regularly proven and spread upon the general plan.

The act of 1837, ch. 1, which was made to provide for the occupant settlers south and west of the Congressional reservation line, and for other purposes, and under which this entry is sought to be made, provides in its first section, that all persons who before or at the passage of the act, were *bona fide* resident occupant settlers upon vacant and unappropriated land, south and west of the Congressional reservation line, may have any quantity of said land, to include his or their improvements, not to consist of more than two hundred acres, surveyed in legal form by the county surveyor, and such survey, the owner thereof may have represented on the plan of the county by the entry taker.

The 2d section provides, that the occupants shall have till the 1st day of January, 1839, allowed them to have their claims proved, surveyed and represented in the plan of their respective counties.

The 9th section provides, that the owner of any land warrant or certificate, may enter the same on any vacant land south and west of the Congressional reservation line, provided they do not interfere with any occupant claim.

The 10th section provides, that the several county offices shall be and remain open from and after the 1st day of January, 1838,

[*Chester vs. Hubbard, et al.*]

until the 1st day of January, 1839, for the purpose of making entries, on which day they shall be finally and forever closed.

The 11th section provides, that occupants provided for by that and all former statutes, and their assignees, who have had or may have peaceable possession of their occupancies for three years, shall be protected in their rights, and no advantage shall be taken of them by reason of any informality, defect or omission in the certificate or probate of occupancy, or in transferring or assigning the same; but the said possession shall bar all other claimants, and be notice against all claims or suits, legal or equitable.

There are several grounds upon which defendant Anderson rests his claim under this statute.

1st. He says, the time for making the entry has expired by the provisions of the 10th section of the statute. It is difficult to say this is not so. But we do not feel that it is necessary to say that it is.

2d. He says, he is protected against the entry by his peaceable and quiet possession of the premises for more than three years, under the provisions of the 11th section of the statute; although he may not have produced legal proof of Allen's occupancy and the assignment to himself; and so we think.

3d. We say, if he is not protected by either the 10th or 11th sections, he is by the 3d. If there be no proof of Allen's occupancy and the assignment, then is Anderson an occupant under the provisions of the 1st section of the statute; and by the 3d section, he is allowed till the 1st day of January, 1839, to prove his occupancy and spread it upon the general plan; and it would be strange if the office were open longer for the reception of entries than the probate of occupancies; and that too under a statute called an act to provide for occupant settlers. Not so. The day the office closed as to one, it closed as to the other, and the occupant having the last possible moment to prove his occupancy, there was no period of time at which the entry-taker could legally receive the entry.

The judgment of the circuit court is, therefore, correct, and will be affirmed.

ATKINSON, et als. vs. COOPER, et als.

1. A court of law has a right, in a summary way, to direct the application of money which has been paid into court.

2. The plaintiff on record has a legal right to receive money on an execution in his name, and a payment of it to him by the sheriff, is a good discharge.

3. Where the plaintiff on record, directs the sheriff to appropriate monies collected by him on an execution in the plaintiff's name, to the satisfaction of an execution in the sheriff's hands against the plaintiff, and the sheriff, in pursuance of such direction, without any knowledge that the plaintiff had disposed of his right to control such execution or the proceeds thereof, does appropriate the money to the satisfaction of such execution, and returns such execution satisfied: Held by the court, that such monies are beyond the reach of the court, and that the court has no power to order the return to be vacated, and the money paid to the equitable owner.

Sackfield Maclin received for collection, notes against James D. Cage & Co. for the sum of \$4,270 12, which were given to Wolsey & Walsh, Bryan, Roadman & Heilin, Miller & Cooper, and Fosset & Jones, merchants of Philadelphia.

Maclin having authority to receive notes from the firm of Cage & Co., to be held as collateral security for the payment of the claims in his hands, and to collect those notes and appropriate the proceeds to the satisfaction of them, called upon James D. Cage, with the view of getting notes. Cage deposited in his hands, notes to the amount of the claims against him, and amongst others, a note upon Cress & Mull, in favor of Lycurgus Cage, as administrator, for the sum of \$2,487 55, due 1st January, 1839. Lycurgus Cage, one of the firm of James D. Cage & Co., received a portion of the sum due on this note, and Maclin instituted an action against the administrators of Cress, and obtained a judgment against them for the balance, to wit, for the sum of \$1,415 96, at the October term of the circuit court of Fayette county, 1839. This note was put in Maclin's hands with the assent of L. Cage, and with the distinct agreement, that Maclin should collect it and appropriate the proceeds to the satisfaction of the claims he held against James D. Cage & Co. The action was instituted in the name of L. Cage, administrator, and nothing appeared of record to show that L. Cage was not the equitable as well as the legal owner of the judgment which Maclin recovered on the note. An execution was issued on this judgment, and placed in the hands of Atkinson, sheriff of Fayette county, who collected the money due thereupon, and

[Atkinson, et als. vs. Cooper, et als.]

L. Cage demanding the proceeds, Atkinson, without having any doubt of the right of Cage to receive the amount, took the receipt of Cage for the sum of \$1,212 80. Atkinson having an execution in favor of Montelius & Fuller against L. Cage, administrator, and H. Locke and James D. Cage in his hands, appropriated about \$900 by the direction of L. Cage, to the satisfaction of it, and endorsed the said execution "satisfied," gave L. Cage a receipt in full against the execution of Montelius & Fuller, and paid the balance of the sum specified in the receipt to Cage. This was done without the consent or knowledge of Maclin, or of those for whom he was acting.

So soon as Maclin was informed of the fact, to wit, at the October term of the circuit court for Fayette county, he moved the court, that the return of satisfaction made by the sheriff upon the execution of Montelius & Fuller, be stricken out, and the monies in the sheriff's hands be paid over to the plaintiffs.

Maclin, on the hearing of the motion, was introduced as a witness; his testimony was objected to by the defendants, and the objection overruled, and he proved the facts above set forth.

The circuit court, Barry, judge, presiding, ordered that the return of the sheriff be stricken out, and that the money remaining in the hands of the sheriff be paid into court, and that it be paid to the plaintiffs in this motion.

Montelius & Fuller, by their agent, and N. Atkinson, resisted the motion, and appealed from the judgment to the supreme court.

A. Miller, for plaintiffs in error.

Question 1st. Have the plaintiffs a right to make this motion, they not being parties on the record?

The act of 1777, ch. 8, sec. 10, p. 666, authorises the person at whose suit the process issues, to make a motion against the sheriff for not rendering money collected for him. By this act, the motion had to be made in the name of the person at whose suit the money was collected. The motion could not be made in the name of the clerk or witness, although the record shows they were entitled to their fees.

The act of 1807, ch. 60, sec. 9, p. 156, authorises the court to render judgment on motion of the person who has recovered money by judgment or decree, where the same has been paid to the clerk, and he refuses to pay it over.

[Atkinson, et als. vs. Cooper, et als.]

The act of 1824, ch. 16, sec. 1, p. 157, gives the clerk a motion against the sheriff for fees collected on execution issued from his office.

Sec. 2. Gives witness a motion against sheriff and clerk, who has collected his fees for attendance.

2. Who, by these acts, are entitled to judgment by motion? It is the persons whom the record shows to be entitled to the money.

In cases of priority of executions, the court will decide the right of the parties of record, though in different suits and courts. *Johnson vs. Ball, Gainer and others*, 1 Yer. Rep. 291.

But there is no case that can be found, where the court has noticed in this summary way the right of individuals who are not claiming as parties to a suit; persons whose demands have not been established by the judgment of a court. The plaintiffs in this motion have no judgment. Their claim against Cage never has been judicially established. Cage has a right to litigate it.

This motion for the money appropriated by the sheriff to the satisfaction of Montelius & Fuller's *fi. fa.*, is made upon the ground, that they have a right to follow that money, or on the supposition that Lycurgus Cage had no right to receipt the sheriff for the money collected, and, therefore, the sheriff should pay it to them.

The motion can be only sustained by the person who has the legal right to the money. *Turner vs. Fendall*, 1 Cranch's Rep. 117.

Money may be taken in execution, if in possession of the defendant. *Ibid.* and 1 Peters' Con. Rep. 260.

Money may be taken in execution, the instant it shall be paid into the hands of the creditor; and it then becomes the duty of the officer to seize it. *Ibid.* 265.

Though the writ command the sheriff to bring the money into court, yet the sheriff may pay it over to the plaintiff, unless enjoined from doing so. *Ibid.* 226.

After the marshal is commanded by the writ, to bring the money (proceeds of sale) into court, he may pay it to the plaintiff in execution, if he please, and this will be a sufficient return of the writ. *Ibid.* 1 Peters' C. C. R. 241.

Money when collected by the sheriff, is not the property of the plaintiff till paid over to him. 1 Peters' C. R. 264.

3. Then, what right had the plaintiffs in this motion, to the money paid on Montelius & Fuller's *fi. fa.*?

[Atkinson, et al. vs. Cooper, et al.]

H. G. Smith, for defendants in error. There are two questions in this case.

1. To whom belongs the money in dispute?

2. The power of the court to direct the payment to plaintiffs?

As to the first:—The money still remains in the hands of the officer of the court; is not actually paid to Montelius & Fuller; it is in court.

As between L. Cage and the plaintiffs:—The right of plaintiffs is clear. For the interest of L. Cage was only nominal.

As between plaintiffs and Montelius & Fuller, the right of the plaintiffs is equally clear. L. Cage having no real interest in the money, can dispose of nothing. An attempt to dispose, avails nothing. To be effectual against the plaintiff's rights, the attempt must be actually executed into accomplishment. This has not been done; the money is not actually paid over; it is in court.

But if the money had been actually paid over to Montelius & Fuller, the plaintiffs could pursue it into their hands. A trust fund may be pursued and recovered, except when it gets into the hands of a *bona fide* receiver or purchaser for full consideration paid on the faith of the fund. 5 Paige, 642, 640.

As to the plaintiffs, this is a trust fund; Cage the trustee; M. & F. paid no consideration upon the faith of this fund, and, therefore, will not be protected against the claim of the plaintiffs, if they actually had received the money.

2. The power of the court. The money is in court. What shall be done with it?

The court has power over it; it will direct it to be paid to the party having right, or direct an interpleader. 3 Peters' C. C. R. 445: the *Ariaden*, 1 Peters' C. C. R. 269.

Assignees of defendants receive money from sheriff; sheriff is protected.

If the court discover that the party applying for money has an equity upon it, they will either direct its payment to him, or direct an interpleader. See, 5 Bos. & Puller.

In 5 John. Rep. though the court refused the motion of the applicant for the money, yet they said in a clear case, they would interfere.

When money had been paid by an order of the district court, under an erroneous construction of an act of Congress, before a final order of the circuit court, in which the suit was depend-

[Atkinson, et als. vs. Cooper, et als.]

ing, the circuit court granted a rule on the person who had received the money, to return it. *The Ariadne*, Pet. C. C. R. 455; cited, 3 Pet. Dig. 83.

The marshal having made the money on an execution, may pay it to plaintiff, and this will be a sufficient return. The court will not interfere in a summary way to distribute money, the proceeds of an execution, unless the same is paid into court. *Wortman vs. Conygham*, 1 Pet. C. C. R. 241.

Granting this motion jeopard's M. & F.'s right under their execution, this is a risk all men run. But no such risk is here. A court of chancery would not enjoin their execution when apprised of the action of the circuit court upon it.

An agent may be a witness for the principal, though in discharge of a liability existing, in case principal do not recover in the action. *Norris' Peake*, 240.

GREEN, J. delivered the opinion of the court.

An execution for \$1,415 96, in favor of Lycurgus Cage against Mull and Trent, administrators of E. Cress, issued from the circuit court of Fayette county, returnable to the February term, 1840. of said court. Said execution came to the hands of the plaintiff in error, Atkinson, who made the money thereon, and on the 12th day of February, before the return day of said *fi. fa.*, and without any knowledge that any other person had a claim to said monies, he took the receipt of said Cage for \$1212 80, part of said execution, of which he paid over part to Cage, and \$900 he retained by the direction of Cage, to be applied to the satisfaction of an execution, then in the hands of said sheriff, in favor of Montelius & Fuller against said Cage, and James D. Cage and Harrison Locke, for that sum.

On the same day (12th February, 1840) he endorsed his return on said last mentioned *fi. fa.* "satisfied by Lycurgus Cage." The said executions were returned into court; but before the sheriff had paid to Montelius & Fuller the money on their execution, as directed by Lycurgus Cage, the defendants in error moved the court to require the sheriff to erase his return of "satisfied" from Montelius & Fuller's *fi. fa.* and to pay said \$900 to them, having proved that they were beneficially interested in the *fi. fa.*, in favor of Cage against the administrators of Cress, and that said Lycurgus Cage was only a nominal party. The plaintiffs in error resisted

[Atkinson, et als. vs. Cooper, et als.]

the motion, but the court ordered the erasure to be made, and the said monies to be paid to the defendants in error. From this judgment the sheriff, Atkinson, and the said Montelius & Fuller, prosecuted this appeal in error.

There is no question, but that the court has a right to direct the application of monies which have been paid into court. And this it will do upon motion, or will direct a bill of interpleader. But unless the money be paid into court, it will not interfere in a summary manner to direct its application.

The only question in this case then is, whether this money is in court in such a way as to give it authority to act in the matter.

It is not disputed but that Lycurgus Cage had a *legal* right to receive the money on the execution in his name, and that a payment of it to him, by the sheriff, was a good discharge to that officer. This being true, it would follow without dispute, that had the entire sum of \$1212 80 been counted into the hands of Lycurgus Cage, and then \$900 had been handed back to the sheriff by him in discharge of Montelius & Fuller's execution, the defendants in error would have had no claim to it. But what legal difference could this ceremony have made? If Cage had a *legal right* to receive the money, and his receipt for the \$1212 80 is a good discharge to the sheriff, it follows that he had equally a legal right to direct its application; and having done so, it was a discharge of the execution, to the payment of which he had directed the sheriff to apply it. If that execution was discharged in point of fact, and in point of law, on the 12th of February, 1840, it could not afterwards be enforced against Cage's co-defendants, by proving that he had violated a trust by the application, to its payment, of a trust fund in his hands.

Nor is it disputed, but that the sheriff acted honestly in this whole transaction; and yet if this motion prevail, he cannot be protected from a motion by Montelius & Fuller. His return of "satisfied" charges him, and renders him liable; and if in obedience to the court, that were erased, he would be liable to a motion for failing to make return.

We, therefore, think this fund is placed beyond the reach of the court, and that legal rights have been created that we have no power to effect by any order we can make; that the money is not in court, but has been applied to the payment of the execution of Montelius & Fuller, in a way the parties had a right, by law, to ap-

[Robertson vs. Gaines, et als.]

ply it, at the time it was done, and that we cannot not now disturb it.

If the only question was between Cage, the nominal plaintiff in the *fi. fa.*, and the defendants in error. as to them the money would be in court, and the court would direct its payment to those beneficially interested; but the case is so entirely changed by the transactions in relation to the other execution, that the money is wholly beyond our reach. Reverse the judgment.

ROBERTSON vs. GAINES, et als.

1. The general principal of the common law is, that a mere naked power to sell, not coupled with an interest, given to several persons, must be executed by all, and does not survive. But when it is coupled with an interest, it may be executed by the survivor.

2. A direction in a will to executors to raise money out of real estate for the benefit of creditors, without specifying how it was to be raised, conferred the power to sell such real estate for such purpose.

3. Where a testator directs his executors to sell lands, without words vesting in them an interest in the lands, or creating a trust, such direction confers a naked power, which does not survive.

4. Where, however, a testator directs his executors to sell lands for the benefit of creditors, or to do any act in which third persons are concerned, and who have the right to call on the executors to execute the power, such power survives.

5. A trust will survive, though no way beneficial to the trustee.

6. Where there is a trust charged upon executors in the disposition they are to make of the proceeds of the sale of real estate, it is the settled doctrine of a court of chancery, that the trust does not become extinct by the death of one of the executors.

7. Where A. and B. were appointed executors, with authority to sell and convey land, and A. qualified as executor and acted as such, and sold and conveyed land: Held, that B. not having qualified or acted as executor, A.'s deed passed the title, though no renunciation or refusal by B. was entered of record.

8. Where executors having power to sell and convey real estate, do sell and convey by deed with covenant of warranty, such covenant of warranty estops the devisees of the testator from setting up and asserting an outstanding title against the vendee of the executors.

This action of ejectment was instituted by Eldridge B. Robertson, on the 11th day of April, 1837, in the circuit court of Shelby coun-

[Robertson vs. Gaines, et als.]

ty, for the recovery of the possession of one thousand acres of land, lying in that county, and held by the tenants of Edmund P. Gaines. It was submitted to a jury at the October term, 1840, Sylvester Bailey, special judge, presiding.

It appeared, that at an early period in the settlement of the territory now constituting the State of Tennessee, Thomas Blount, of the State of North Carolina, engaged the services of Elijah Robertson as a locator of lands in the said Territory; that Robertson located many tracts for him; that in the year 1788, a grant issued from the State of North Carolina to John G. and Thomas Blount, for the tract of land now in controversy; that about the year 1799, Thomas Blount being indebted to Robertson, for locating services, conveyed, jointly with John G. Blount, fifteen tracts of land to him, of which the present was one, and that said deed was lost, never having been registered. Elijah Robertson died in 1797, leaving heirs, to wit, Elizabeth Robertson, afterwards Elizabeth Childress, Patsey Robertson, afterwards Patsey Hannum, Sterling C. and Eldridge B. Robertson. Thomas Blount died in N. Carolina in 1808, having made his will. This will appointed his brothers John G. Blount and Willie Blount, and his nephews, Thomas H. and W. G. Blount his executors. It was proved and recorded in 1812. William G. Blount and Thomas H. Blount alone qualified and acted as executors. The other two did not qualify, nor did they act as executors. It does not appear that they ever refused or renounced the executorship by record or by any kind of writing whatever. This will, after otherwise disposing of two tracts, gave all the rest and residue of the share of the testator in the lands owned in Tennessee by testator and John Gray Blount, to the two sons and three youngest daughters of William Blount, deceased, with the condition, however, attached thereto, that out of these lands was to be raised by his executors, in such manner as they should think best, a sum of money equal to all the just debts of the testator, which should be appropriated to the payment of them. Gaines intermarried with Barbara Blount, one of the devisees provided for as above set forth, and had issue by her capable of inheriting.

In 1823, John Catron having intermarried with one of the descendants of Elijah Robertson; and the heirs of said Elijah having requested that payment of the services of said Elijah should be made to said John Catron, he took to himself a deed for fifteen tracts of

[Robertson vs. Gaines, et als.]

land, of which the tract in controversy is one, from the acting executors of Thomas Blount deceased, to wit, from Thomas H. Blount and William G. Blount. This deed recited, that Thomas Blount, deceased, was indebted to Elijah Robertson, deceased, for services performed in locating lands for him; that said Thomas Blount, with his brother John G. Blount, did by formal deed, executed about the year 1797, convey to the said Robertson, the fifteen tracts of land; that said deed of conveyance was lost without ever having been registered; that said Robertson had died, leaving heirs at law, and that Thomas Blount died in the year 1806, leaving a will, which appointed John G. Blount and Willie Blount, his brothers, and his nephews, Thomas H. Blount and William G. Blount his executors, and directed that his executors should raise out of the lands in Tennessee, a sum equal to all his debts, to be appropriated to the payment thereof. That Thomas H. Blount and William G. Blount qualified as executors of the said will, and had acted in execution thereof, but that the said John G. Blount and Willie Blount, had never qualified as executors or acted as such; that the heirs of said Robertson had assigned their claim against the estate of Thomas Blount, deceased, to John Catron in part, and requested that "the payment should be made to John Catron by a conveyance of lands or otherwise, in full discharge of said demand," and that, therefore, "to supply the lost deed, and to discharge said demand of the heirs of Elijah Robertson against the estate of Thomas Blount, deceased," the said executors sold and conveyed the land to John Catron.

At the date of this deed, John Gray Blount, to whom this tract in controversy was granted jointly with his brother Thomas, conveyed all his interest in the same to John Catron.

Upon a division of the estate of Elijah Robertson, this tract was assigned to Eldridge B. Robertson, and conveyed by Catron to him.

Bailey, special judge, charged the jury upon the above facts as follows:

1. That where a party introduced a deed, and claimed under such deed, it was evidence for him as well as against him, and that the was bound by the recitals contained in it; that, therefore, if the jury found that the deed from the executors, introduced by the plaintiff, recited the fact, that a deed had been executed about the year 1789, by John G. and Thomas Blount to Elijah Robertson, for the identical tract of land sued for in this action, although it recited the sub-

[Robertson vs. Gaines, et als.]

sequent loss of such deed without registration, still the recital would be notice to the plaintiff of such deed, and would be good evidence without further proof of a legal outstanding title to the whole tract in said Robertson, or if he was dead, then in his heirs; that when a deed was once signed, sealed and delivered, the vendor by the execution of it divested himself of the legal estate; no title, legal or equitable, remained in him; he was seized of nothing for the use of the vendee, and no act remained to be done by him to give effect to the conveyance.

2d. That the law was, that if authority be given to executors to sell, a surviving executor might sell, and an acting executor was put in the same situation upon the renunciation of the other executors by the words of the statute of 21st Henry 8th, ch. 4. But that in order to understand who where meant by the term, *acting executors*, it was necessary to state, that where several persons were named as executors in a will, and some of them took upon themselves the execution of the will, and the others renounced, those who undertook such execution by due course of law, were deemed acting executors in contradistinction to those who did not act; and that the only evidence of such renunciation must be a renunciation made in the court where the will was proven, and there put upon record, and that otherwise it would not appear but that all were acting, whilst only a part had executed the power given by the will, and that unless it appeared to them by record evidence, that a renunciation had been made by two of the executors named in the will, the deed by two to the vendee, Catron, would convey to him no title.

The court further charged the jury, that so far as said deed purported to be made to supply a lost deed, to that extent it was a void execution, or if they believed that said deed was executed for the purpose of satisfying and extinguishing a locative interest in lands such as was usually implied from such services, it would not then be well executed, and would not on that account confer any title; and if the jury found said deed made for such purposes, they would regard it as null and void, and find for the defendant to the extent of land covered by said deed; but if they believed from the evidence before them, that Thomas Blount, in his life time, was indebted to Elijah Robertson for services in locating land at a fixed price, or at the worth of such services, not payable as a locative interest in the land entered, but as a debt to be paid by said Blount, then the

[Robertson vs. Gaines, et al.]

power would be well executed, and to that extent they would find for the plaintiff.

The jury returned a verdict for the defendant, Gaines. The plaintiff moved the court for a new trial, which was overruled and judgment rendered thereupon. The plaintiff appealed in error to the supreme court.

W. T. Brown, for the plaintiff in error.

Thomas J. Turley, for Gaines. The first and perhaps the most important and difficult question in this case is,

Can the power be executed by the two *acting* executors without the concurrence of their *co-executors*, who were living at the time, but who had *omitted* to prove the will and take upon themselves the trust?

This will gives to the executors, as we contend, a *naked power*, a *bare authority* not coupled with an interest. The fee is absolutely devised to his nephews and nieces, and with it also the rents of the lands, subject to be divested by some act or acts of the executors for the purpose of raising money to pay off the debts of the testator, if any were found to exist. Sug. Powers, 106 to 111, inclusive and authorities cited. Sug. Powers, 128: Law Lib., No. 38: 1 Thom. Coke, 396, marginal page, 397: *Ibid.* 398-99, &c.: *Ibid.*: 2 Thom. Coke, 118-17: 2 Shep. Touch. 448: Powell Dev. 233, 237-8, marg.: Law Lib. vol. 15, No. 55: 2 Burr Rep. 1027, *Lancaster vs. Thornton*: 1 Atk. 474-6: 7 Yer. 18: 1 Williams Ex'rs, 415: 7 Cowen's Rep. 187, 193.

This being the case, it might be successfully argued, that the power does not survive.

But all this doctrine about naked powers, and powers coupled with an interest or trust, we believe to be wholly immaterial to question, and unnecessary for this court to decide. The question is not, whether the power is coupled with an interest, nor whether it will survive. But the question is as already stated, whether, when all four of the persons named executors are actually living, though two of them have neglected or omitted to act, the other two can execute the power?

The rule of the common law was, that when power to sell was given to several, a sale by some or one of them was invalid. 1 T. Coke, 398: Sug. Pow. 162: 20 Law Lib. 139-40: 2 Williams Ex'rs, 623-4: 2 Shep. Touch. 448:

[Robertson vs. Gaires, et als.]

But besides the above authorities, we have also the authority of the Parliament itself, that this was the rule. For in the recital of the act of the 21st, Henry 8, ch. 4, it is expressly said, that this was the rule, and that statute was made expressly to alter the law in that particular. And as that statute is the law of this State, it is our business to see how it has altered the rule.

The words of the statute are, "Where part of the executors," &c.: from which it is manifest, that the *validity* of the sale made by *part* of the executors depends upon the fact, whether there has been a *refusal* of the rest. See all the authorities above cited.

The question then is, what is a *refusal*?

We say, a *refusal* can only be by some act made and entered of record. Went. Off. Ex'rs, 38 and 88 14th Ed.: 2 Rob. on Wills, 43, and he refers to Roll's Abr. 907: 1 Williams Ex'rs, 153: 3 Bac. Abr. 43: Toll. Ex'rs 42: Swinb. on Wills, 6, sec. 12: 4 Pick. 33: 16 Serg. & Rowl. 416: 3 Binn. 69: 4 Yer. 16.

Upon such *renunciation* the *acting* executor is put in the state of a surviving executor. Sug. Pow. 167, note 1: 3 Binn. 69: 1 Cains Cases, 16.

And this is the law, whether the executor have only a *power* to sell, or whether the land is devised to them to be sold; thereby giving them an interest. 1 Coke Litt. 398: 2 do. 118, note 1: 2 Williams' Ex'rs. 624. For if this were the law in the case of a naked power, where the executor took no interest, *a fortiori*, it is the law, where an executor took an interest. For the reason, that A. shall not sell the interest of B. while B. is living.

But we also say, this power was not well executed by the executors, because it does not come within the provisions of the act of 21st Henry 8th. That statute provides for a case where the executors are ordered and directed to sell: and it is an imperative duty on them to do so. In this case a sale is not positively directed; it is discretionary in what manner they shall raise the money. 3d Bibb Rep. 349. It remains as at common law.

Nor is it well executed, for the reason that it was not sold and conveyed for the *payment of debts*; a locative interest not being a debt. 6 Yer. 411. But if it were a debt, still that fact, to wit, the performance of the services in locating lands, should have been proven; the recital of that fact can be no evidence against us. The indebtedness must be shown by them to exist. It is the only contingency upon which they could sell. It is a condition prece-

[Robertson vs. Gaines, et als.]

dent. The intention in this, as in all other cases, is the controlling and governing principle. 6 John. R. 73: also Cro. Car. 335: 2 Chan. Cas. 221: Sug. L. Ven. 343-4: 1 Pick. 318: 14 Mass. Rep. 495: 2 Lit. Rep. 245: 4 Monroe, 392: 2 Pirt. Dig. 206: 1 Powell Dev. 245, note. And, even, if the recitals were evidence against us of the existence of the debts; still they go on to show that the debts were extinguished by the first conveyance; therefore, executors had no right to convey the second time.

We also contend that the plaintiff himself has shown an outstanding legal title in another. The recitals in his title deed show that fact, and he is bound by them, and cannot dispute them. 1 Stark. 302 to 305: 1 Saund. Ple. and Ev. 42: 1 Story Eq. 387, sec. 400: 6 Com. Dig. Plead. 239, sec. 5.

An unregistered deed passes the legal title. 3 Yer. 171: 10 Yer. 1.

G. D. Searcy, for Gaines. The deed from Thomas Blount's executors to Catron, recites, "that John G. and Thos. Blount, in the life-time of Thomas Blount, conveyed the lands hereinafter described, by deed, to Elijah Robertson, in consideration of the services of said Robertson, rendered to them in locating lands. That the deed executed by the Blounts to Robertson is lost, and that this deed is made to supply the same."

Recitals in a deed are not only evidence against the party making them, but against any person claiming under him. They estop parties and privies: privies in blood, in estate, and in law. *Jackson vs. Parkhurst*, 9 Wend. 209.

When an estate passes by deed, the cancelling of such deed afterwards, will not divest any estate out of the person in whom it was vested by that deed. Cruise, 497: *Morgan vs. Elam*, 4 Yer. 375.

The plaintiff cannot recover the premises in question, having shown an outstanding title in the heirs of Robertson.

We further contend, that the deed from Thomas Blount's executors to Catron, passes no title to the land in question. Thomas Blount devised this land to the three sons and two youngest daughters of William Blount, conferring upon his executors a power, out of the lands so devised, to raise a sum of money equal to his debts, which they were directed to apply to the payment thereof. He appointed John G., Willie, Thomas H. and William G. Blount his

[Robertson vs. Gaines, et als.]

executors. Only two of the executors qualified; Thomas H. in N. Carolina, and William G. in this State.

Upon the death of Thomas Blount, the legal title to the premises in question, by virtue of the will passed to, and vested in the devisees. The will conferred upon the executors a bare naked power, an authority not coupled with an interest. Sugden, 131.

Four persons were nominated by the will, who were to exercise their judgment as to the manner in which the money chargeable on the land should be raised. The rule of the common law is, that where power to sell is given to several, a sale, unless made by all of them, is invalid. Co. Lit. 113: Sugden, 139.

We maintain, that the common law rule must govern this case. The rule as applicable to this case, has not been changed by the statute of 21st Henry 8, ch. 4. The words of that statute are, "that where part of the executors named in such testament, directing such lands, &c., to be sold by the executors, do refuse to take upon him or themselves the administration and charge of the same testament or last will, that then all bargains and sales of any such lands, &c., made by him, or them only of said executors, that so doth accept, shall be as good and effectual in law, as if all the said executors, so refusing the administration of the same will, had joined him in such bargain and sale."

It is manifest that the validity of a sale made by a part of the executors, depends upon the existence of two facts :

1st. Whether the will directs a sale.

2d. Whether there has been a refusal of the other executors to act.

As to the first point: the will directs the executors, out of the lands devised, to raise a sum of money for the payment of debts. The power here given is a trust and confidence to be exercised by the executors jointly, according to their best judgment. It does not *direct*, nor necessarily imply a sale, but leaves it discretionary with the executors as to the manner in which the money shall be raised. The statute applies *only* to cases where lands are directed to be sold, and not to cases where a discretionary power is given; where a trust and confidence is reposed. The case of *Wooldridge's heirs vs. Watkins*, 3 Bibb, 350, is in point. There power was given the executors to sell or exchange, as they might judge necessary, for the advantage of the estate. It was held, that one executor, though he alone qualified, had no power to sell without the concurrence of the other executors.

[Robertson vs. Gaines, et als.]

As to the second point; we contend that there has been no refusal, but only an omission or neglect to qualify. A refusal can only be made by some act of record—any act in *pais*, as a mere verbal declaration to that effect is not sufficient to give it validity; it must be solemnly entered of record. See Toller, 42: Wentworth, 88: Williams, 153: Bacon, Title Ex'rs, 405: 4 Pick. 42: 16 Sergeant & Raw. 416.

In *Zebeck vs. Smith*, (3 Binny, 69,) Yates, judge, said, "It seems to be admitted on all hands, that if authority to sell be given to executors *virtute officii*, an acting executor is put in the same state as a surviving executor, upon the renunciation of the other executors, by the words of 21st Henry 8, ch. 4. In this case two of the executors renounced; it is an authority.

We rely upon the New York cases as fortifying the position here contended for. They turn upon a significant alteration of the statute of 21st Henry 8, ch. 4. The words of the New York statute are, "and if any executor shall *neglect* or *refuse* to take upon him the execution of such will, then all sales," &c. In the English statute the power is given to one of several executors, when the rest *refuse*. In the New York statute the power is given to one of several, when the rest *neglect* or *refuse*. By the first, an act is required to make the sale by one valid. By the second, a mere omission will suffice.

Again: This deed passes no title to Catron, because it was not executed in pursuance of the power. The will gave the executors power, out of the lands devised, to raise a sum of money to pay debts. This power would authorise a sale, but a sale to pay debts *only*. It is a naked power, and must be strictly pursued. In the case of *Taylor vs. Atkins*, 1 Burrow, 120, Lord Mansfield said, "The intent of the parties who gave the power, ought to govern every construction. He to whom it is given, has a right to enjoy the full exercise of it. They over whose estate it is given, have a right to say it shall not be exceeded, the conditions shall not be evaded; it shall be strictly pursued in form and substance. And all acts done under a special authority, not agreeable thereto, nor warranted thereby, must be void."

This was not a sale for money, and a power to sell, does not authorise an exchange or barter, but a sale for money only. *Taylor vs. Galloway*, 1 Hammond, 232.

It was not made in discharge of a debt:

[Robertson vs. Gaines, et als.]

1st. Because the interest which Robertson acquired by locating the lands was not a debt, but a charge upon the land, an equitable right to an undivided interest in the land.

2. Because this deed was not made in consideration of Robertson's services in locating the land, but to supply a deed, said to have been made by Thomas Blount, in his life-time, conjointly with John G. Blount, which was lost.

In the case of *Floyd vs. Johnson*, 2 Littell, 115, the court held, that a power to executors to sell land for special purposes, gave them authority to sell only for those purposes. Here the will charged the land with the payment of debts. The executors could sell for no purpose but that of paying debts.

W. T. Brown, for Robertson, in reply.

GREEN, J. delivered the opinion of the court.

Thomas Blount of North Carolina, made his last will and testament in 1808, which was proved and recorded in 1812, the sixth clause of which is as follows:

"I give and bequeath to the three sons and two youngest daughters of my second brother William Blount, all the rest of my share of the lands in Tennessee, owned by John G. and Thomas Blount, to be divided among them or the survivors of them, at the time of my death, equally, share and share alike, but it is to be understood that out of these lands, before a division of them is made, such as is herein directed, is to be raised by my executors in such manner as they shall think best, a sum of money equal to all my just debts, which they shall appropriate to the payment thereof."

He appointed John Gray Blount, Willie Blount, Thomas H. Blount and Wm. G. Blount his executors, of whom Wm. G. Blount and Thomas H. Blount alone qualified. It was agreed, "that the other two executors did not qualify, nor would they qualify or act as executors, but no refusal or renunciation was ever made in court or entered of record, nor did they ever refuse by writing of any kind whatever."

A deed was executed to the land in controversy, the 27th of September, 1823, to John Catron by the two acting executors, Thos. H. and Wm. G. Blount, reciting, "that whereas Elijah Robertson had located lands for the said Thomas Blount, deceased, and the said Thomas was indebted to the said Robertson for said locating, and

[Robertson *vs.* Gaines, et als.]

about the year 1789, did by a formal deed, convey to the said Elijah the fifteen tracts of land hereinafter described, conjointly with his brother John Gray Blount, the said fifteen tracts of land having been granted to the said John Gray and Thomas Blount jointly, and afterwards said deed of conveyance was lost without ever having been registered. And whereas, in the year 1797, the said Elijah Robertson died, leaving Elizabeth Robertson, afterwards Elizabeth Childress, Patsey Robertson, afterwards Patsey Hannum, Sterling C. and Eldridge B. Robertson, his heirs at law. And whereas, about the year 1808, the said Thomas Blount died, leaving a last will, which contains power to pass real estate, and by which will he appointed his brothers John Gray Blount and Willie Blount, and his nephews Thomas Henry Blount and William G. Blount, his executors, and who by his will were instructed to raise out of the lands granted to John Gray and Thomas Blount, and lying in Tennessee, in such manner as his said executors should think best, a sum equal to all his just debts, which they should appropriate to the payment thereof. And whereas, the said Thomas H. Blount and William G. Blount qualified as executors of said will, and have acted in execution thereof, the said John G. Blount and Willie never having qualified as executors to said will, nor acted as such. And whereas, the heirs of the said Elijah Robertson have assigned their claim against the estate of the said Thomas Blount, to the said John Catron, in part, and requested that the payment should be made to said Catron, by the conveyance of lands or otherwise, in full discharge of said demand. Therefore, to supply said lost deed, and to discharge said demand of the heirs of Elijah Robertson against the estate of the said Thomas Blount; we the said Thomas H. Blount and William G. Blount, executors of the will of Thomas Blount, do hereby bargain," &c.

E. B. Robertson plaintiff, derived title from a grant to John G. and Thomas Blount, the will of Thomas Blount, the aforesaid deed of his executors to Catron, a deed from John G. Blount to Catron, and a deed from Catron to himself.

The defendant, E. P. Gaines, intermarried with Barbara Blount, one of the devisees of the Tennessee lands, by whom he had issue capable of inheriting; and was admitted to defend for tenants in possession, as their landlord; claiming the land as such devisee.

1. The principal question arising upon this state of facts is, whether the conveyance to Catron by only two of the executors of

[Robertson *vs.* Gaines, et als.]

Thomas Blount, the other executors named in the will never having qualified or acted as such, is valid to pass the title of the testator to the land in question.

The general principle of the common law laid down by Lord Coke (Co. Litt. 112, *b*) is, that a mere naked power to sell, not coupled with an interest, given to several persons, must be executed by all, and does not survive. But when it is coupled with an interest, it may be executed by the survivor. 2 John. Chan. Rep. 19: 10 Peters Rep. 564.

In the application of this rule, much difficulty has arisen. The distinction between a naked power, and a power coupled with an interest, is laid down by Mr. Justice Thompson, in the case of *Peter vs. Beverly*, (10 Peters Rep. 564,) with as much precision as the question is susceptible of being treated. It is this: "a mere direction in a will to the executors to sell lands, without any words vesting in them an interest in the land, or creating a trust, will be only a naked power, which does not survive." "But when any thing is directed to be done, in which third persons are interested, and who have a right to call on the executors to execute the power, such power survives."

It is not necessary that the executor should have a personal interest in the thing to be done. The possession of the legal estate, or a right in the subject, over which the power is exercised, creates the interest. Hence a trust will survive, though no way beneficial to the trustee. 2 John. Chan. Rep. 20: 10 Peters Rep. 564. When there is a trust charged upon executors, in the disposition they are directed to make of the proceeds, it is the settled doctrine of a court of chancery, that the trust does *not* become extinct by the death of one of the executors. 2 John. Chan. Rep. 20.

The devise in this case, is in the following terms: "But it is to be understood, that out of these lands, before a division of them is made such as is herein directed, is to be raised by my executors, in such manner as they shall think best, a sum of money equal to all my just debts, which they shall appropriate to the payment thereof."

The power thus conferred, is vested in the executors *as such*, to be exercised by virtue of their office, for the benefit of creditors, among whom the fund was to be distributed. The direction to *raise* money out of the land without specifying *how* it was to be raised, conferred the power to sell it. In the case of *Bateman vs.*

[Robertson vs. Gaines, et als.]

Bateman, (1 Atk's, 421,) the testator directed that if his personal estate and house and land at W. should not pay his debts, then his executors were to *raise* the sum out of his copyhold estate. It was held, that the power thus conferred, authorised a *sale* of the copyhold estate. See also, 2 Story's Eq. 324.

But in relation to the lands out of which the money in *this* case was to be *raised*, there is much stronger reason for saying that a *sale* of them is authorised, than exists in the case above referred to. In this case the lands were wild and unimproved, and no effectual means of raising money out of them for the payment of debts existed, but by their sale. And as the great and leading principle which applies to the construction of other parts of a will, should also be applied to the construction of powers conferred by it, to wit, to ascertain and carry into effect the intention of the testator, we cannot be mistaken in the conclusion that it was his intention by this clause, to confer a power of sale. The case of *Wooldridge vs. Watkins*, (3 Bibb Rep. 350,) is not an authority against the power of sale in this case. In that case the will left it to "his executors to sell or exchange his real estate as they might judge necessary for the advantage of his estate." No sale of the estate was directed either by express words or by implication. They were to sell or exchange as they might judge necessary for the advantage of the estate. It might not be for the advantage of the estate to do either, so that no disposition of the estate is unconditionally directed to be made. In that case too, there was no interest vested in the executors, no *trust* created by the will, so that any person interested in the execution of the power, could come into a court of equity and enforce it. But the case is wholly different where money to pay debts is directed to be raised. In such case, the creditors are interested in the execution of the power, and have a right to require the executors to fulfil the trust for their benefit. In a case like this, by the rule of the common law, a surviving executor would be authorised to execute the power.

By the statute, 21st Henry 8, ch. 4, acting executors, when the others refuse to act, are put upon the same footing with surviving executors. The statute provides, "That when part of the executors named in such testament, directing such lands, &c., to be sold by the executors, do refuse to take upon^e himself or themselves the administration and charge of the same testament, or last will, that then all bargains and sales of any such lands, &c., made by him or

[Robertson vs. Gaines, et als.]

them only of said executors, that so doth accept, shall be as good and effectual in law as if all the said executors, so refusing the administration of the same will, had joined in such bargain and sale."

This brings us to the consideration of the question, what shall be regarded as a refusal, within the meaning of the statute?

It is contended by the counsel for the defendant in error, and so the circuit court charged the jury, that a refusal must be made a matter of record, otherwise a sale by the acting executors would be void.

It is certainly true that the Spiritual court in England will not commit the administration of an estate to another, until the refusal of the executor to act has been recorded in the court. 1 Williams Ex'rs, 153: Went. Off. Ex'r, 88, 14th Edition. But if the executor send a letter to the Ordinary, by which he renounces, and the refusal be recorded, it is sufficient. 1 Williams Ex'rs, 153. If administration be granted to another, before the executor has renounced of record, it is absolutely void. Tol. Ex. 44, 93, 120. The reason is, that in England the executor's title is derived from the will, and does not depend upon the grant of letters testamentary. A title to the goods and chattels is vested in the executor immediately upon the testator's death. Toller Ex. 40. Until he renounces, that title cannot be divested. But if a grant of administration, before such renunciation, were valid, it would vest the title to the goods in the administrator, and thereby divest the executor of *his* title, in violation of the principle above stated. It follows that administration granted before such renunciation is void.

But in this State, North Carolina, Virginia, and perhaps other States of the Union, the law in this particular has been changed.

By the act of 1715, ch. 48, sec. 4, it is provided, that "no person shall enter upon the administration of any deceased person's estate until he has obtained letters of administration, or letters testamentary, under the penalty," &c.

By the 5th section, it is provided, that letters testamentary should not issue, until the executor took an oath to perform the will of the testator.

By the act of 1813, ch. 119, sec. 3, (Car. & Nich. 79,) it is provided, that "all executors, of every description, shall, before they presume to enter upon the administration of any estate whatever, enter into bond and security in the same way that administrators are required to do."

[Robertson vs. Gaines, et als.]

By these acts, executors are prohibited from meddling with the estate until they obtain letters testamentary, give bond and security, and swear to perform the testator's will. So that the will *alone* confers upon the executor no title whatever, and if he *neglect* to prove the will, qualify, and give bond and security, the court of probate may act upon the estate, and grant letters of administration. 4 Yer. Rep. 16. No formal renunciation is required; but letters of administration are valid without such refusal.

From this comparative view of the powers of the courts of probate, in England and this country, it may be seen that, however, the question under consideration may be considered in England, *here*, no record evidence of refusal to act is necessary. Indeed, it is questionable whether it be necessary in England. The evidence of *refusal*, that the Ordinary will require, before he will grant administration, is not necessarily the *only* evidence that would establish such refusal, so as to validate a sale made by acting executors. All the authorities upon the subject of the necessity of refusal being of record, are applicable to the question of the power of the Ordinary to grant administration. And we have seen, that a mere letter which he orders to be recorded, will be sufficient. And as there is much more reason for requiring a solemn act of renunciation of record, in reference to the question of granting administration, than need be demanded to make valid the acts of co-executors who are acting in the administration of the estate; and as in the former case, a mere letter will do; it would seem, that in the latter case any act, *in pais*, evidencing such refusal, would be sufficient. And as there is no case in which it has been held, that a sale by acting executors was void because the co-executor, who did not join in the conveyance, had not refused of record to act, a strong presumption exists, that the courts would not so decide. There is no reason why any other satisfactory evidence will not be sufficient. The statute does not prescribe the mode of proof; for the fact, that before the passage of the statute, the Spiritual court had adopted the rule, that a renunciation must be of record, in order to *their* action in granting administration, is a very slight circumstance to prove that the statute meant to require the same proof in reference to a very different subject; and one in relation to which the reason for adopting the rule did not exist. But be this as it may in *England*, it would certainly be extremely inconsistent in *us* to require stronger and more authentic evidence of a re-

[Robertson vs. Gaines, et al.]

fusal to act, in order to make valid a sale under the statute, by acting executors, than we require in order to make a grant of administration valid. And we have seen that a *neglect* to give bond and qualify, is sufficient in the latter case. So in the former, *neglect* is evidence of refusal, for while he neglects, he refuses.

This view of the subject is supported by several cases in the United States, and is opposed by none. In the case of *Gaddy & Knox vs. Butler and wife*, (3 Munf. Rep. 345,) the court of appeals of Virginia decided, that a renunciation need not be of record to justify a deed made by the executors who *acted*; and that a refusal may be found, either in a declaration to that effect *in pais*, or presumed, as in other cases. It is argued, that this case is not an authority, because the judgment was reversed, the special verdict having found that the deed was executed by a part of the executors, *the other never having taken upon themselves the burthen of the execution of the will, and never relinquished their right so to do*; and the judgment of the court below having been in favor of the deed, its reversal shows, that upon the *facts* stated in the special verdict, the court did not consider the acting executors had power to make it. But upon looking into the opinion of the court, which is very short, it will be seen that the jury did not find a *refusal* of the other executors, which, they say, was necessary to be found; but that the evidence upon which they were authorised to find such *refusal* need not be a renunciation of record, but that it might be found either from declarations *in pais*, or presumed, as in other cases. The judgment of the court below was reversed, because the verdict was too defective in this particular. But a *venire facias de novo* was awarded, which is conclusive that the court considered the evidence sufficient to have justified the jury in finding a refusal. Had they not thought so, they would not have remanded the cause for another trial; for it was distinctly found by the jury, that the executors, who did not join in the deed, *never relinquished their right to take upon themselves the burthen of the execution thereof*. So that it is perfectly clear, that if the court had deemed an *express* relinquishment necessary, a judgment *final* would have been rendered for the defendants.

The case of *Wood vs. Sparks*, 1 Bat. & Dev. Rep. 389, is a very strong authority upon this point. I have not that case now before me, but I examined it last winter, and was impressed with the clearness and force with which the question was discussed by

[Robertson vs. Gaines, et als.]

Gaston, one of the most enlightened and able judges of this day.—The court held, that a neglect to qualify, was a refusal, *prima facie*, and that a deed executed by acting executors was valid.

Fortified by these authorities, and by our own convictions of the reason of the rule, especially under our system, we have no hesitation in pronouncing, that a neglect to qualify is *prima facie* evidence of refusal, and will validate a sale by the acting executors.

2d. But it is contended by the defendants in error, and so the court charged the jury, that the recital in the deed to Catron, that John G. Blount and the testator had executed a deed for these lands to Elijah Robertson in 1789, which had never been registered and was lost, is evidence of an outstanding title, which would prevent a recovery in this case. We need not stop here to investigate the question, what effect will be given to such recitals in a deed; it is sufficient for the present purpose to say, that the covenant of warranty in the deed of the executors to Catron *estops* the defendant here from setting up an outstanding title against it. The record shows that he claims title to this land as a devisee under the will, by virtue of which these executors acted in making the deed. He is, therefore, a privy in estate, and can no more set up a title in opposition to a deed of the executors, made in pursuance of the will, than if the deed had been made by the testator himself. And it will not be pretended, that if Thomas Blount had executed the deed with these recitals, either himself, his heirs or devisees could set up an outstanding title against the covenant of warranty, so as to defeat the very title created by his deed. There was, therefore, error in this part of the charge of the court.

3d. But it is insisted that the recital in the deed, that it was made in satisfaction of a demand for locating services performed by Elijah Robertson, and to supply a lost deed which had been executed to him for that purpose, which claim, in part, had been assigned by the heirs of Elijah Robertson to John Catron, to whom the deed was executed, does not present a case falling within the power conferred upon the executors to sell land for the payment of debts; and therefore the deed is void.

Upon this question we have very great difficulty, and we are unable to arrive at any satisfactory conclusion. The case has been argued elaborately, and with much ability on both sides, but other questions have been deemed more important, and have occupied the chief attention of counsel. We, therefore, decline the discus-

[Fowler vs. Norman.]

sion, and the decision of this last point at this time, that it may receive hereafter that attention its difficulty and importance demands.

Let the judgment be reversed, and the cause be remanded to the circuit court of Shelby county, for a new trial to be had therein.

FOWLER vs. NORMAN.

Where slaves had been committed to the custody of a jailor as runaways and make their escape before the lapse of twelve months: Held, that the sheriff acquires no such lien upon them for his fees, as will sustain an action of detinue against a third person for the recovery of the possession of them.

A negro man, a slave, was committed to the custody of J. W. Fowler, sheriff and jailor of Shelby county, on the 24th October, 1837, and remained in his custody one hundred and ninety days. A negro woman was also committed to his custody on the 22d April, 1838, and remained in his custody thirty days. They made their escape, and on the 18th of May, 1838, they were, by virtue of a mittimus, committed to the custody of the sheriff and jailor of Carroll county, as runaways. After said slaves had been in the jail of Carroll county three months, Fowler, by his authorised agent, demanded the slaves of the jailor of Carroll and tendered him the amount of his fees. He received his fees, ninety-nine dollars, and the agent of Fowler took his receipt therefor. He, however, subsequently refused the surrender of the slaves to the agent, and offered to return the money paid to him, which Fowler's agent declined receiving.

Fowler instituted an action of detinue in the circuit court of Carroll county, against Norman, sheriff and jailor, on the 3d day of September, 1838, and the above facts were submitted to a jury at the May term, 1840. The court, Benjamin C. Totten, judge, charged the jury, that a right of property, either general or special, must concur with the right of possession in the plaintiff, to enable him to maintain the action of detinue; that some of the processes of the law would vest in the officer sufficient title for that purpose, but that the mittimus was not of that character; that although he might compel the owner of the slaves, before surrendering them, to pay the fees due for keeping them, yet that provision, resulting

[Fowler vs. Norman]

from public policy in reference to slaves, would not create such a lien upon, or title to them, as would enable the jailor, from whose custody they had escaped, to pursue them by action of detinue into the hands of another jailor, into whose hands they came as runaways; and, that the fact of the payment of the fees to the sheriff of Carroll, would not alter the case.

The jury under this charge, brought in a verdict for the defendant. A motion for a new trial was made by plaintiff, and overruled. The plaintiff appealed in error to this court.

McLanahan, for Fowler.

Pavatt, for Norman.

TURLEY, J. delivered the opinion of the court.

This is an action of detinue, brought by the plaintiff in error, against the defendant, to regain possession of two negroes, a man and woman. Upon trial, a verdict and judgment were rendered for defendant; a motion for a new trial was refused, and the bill of exceptions makes out the following case:

The negroes had been committed to the custody of the jailor of Shelby county as runaway slaves, and had remained in his custody for a period of time short of twelve months; they had broken jail and been recommitted as such to the jail of Carroll county. The plaintiff, as sheriff of Shelby county, demanded the negroes from the defendant, as jailor of Carroll county, and paid him his fees for the time he had them in custody, which, however, were immediately offered to be returned, and were refused by the plaintiff.

The question presented, is, had the plaintiff (under the circumstances) such a lien upon the negroes for his fees of detention as will give him this action? We think not. It is provided by the act of 1825, ch. 77, sec. 1, that in all cases, where any slave shall have been committed to any of the jails in this State as a runaway, and shall have been duly advertised by such jailor as required by the laws of this State, and shall not be reclaimed and proven away by the owner, and shall have been imprisoned for the term of twelve months, it shall and may be lawful for the sheriff, having previously advertised the same thirty days, to expose such slave to public sale to the highest bidder, and to apply the proceeds in the first place to the payment of the costs and jail fees, and the surplus

[Trigg vs. McDonald.]

to pay to the county trustee. It is contended, that this statute vests the sheriff with such a legal right as to enable him to maintain detinue for the slave, if he or she escape from jail. We do not think so. His duties as prescribed by the act, are merely official, and if the contingency upon which their performance depends, does not arrive, he cannot exercise them. That is, if the negro does not remain in the jail of the county for the space of twelve months, without being claimed and proven by his master, the sheriff has no duties to perform under the law; and having none to perform, he can have no interest in his possession, and can bring no action to regain it. The judgment of the circuit court will, therefore, be affirmed.

TRIGG vs. McDONALD, Sheriff.

1. The return of a sheriff to a *fi. fa.* must answer the whole writ.
2. It does not follow that because the defendant in an execution may have had property in his possession during a part of the time the sheriff had the writ in his hands, the sheriff is guilty of a false return by returning "*nulla bona.*"
3. Whether the return was or was not false, in such a case, would depend upon whether the sheriff knew at the time he held the writ that the defendant had then goods in his hands, and whether he was or was not guilty, under all the circumstances of the case, of negligence in the failure to secure such goods and sell them for the satisfaction of the execution.
4. If a sheriff fail to make a levy in due time to sell, and make due return, he is guilty of negligence, which subjects him to an action at the instance of the plaintiff in execution, but not to a motion for a false return.
5. In case the plaintiff in the execution receives money collected on the writ he thereby waives his right of action against the sheriff for a false return on that writ for the balance.
6. The act of 1794, ch. 1, sec. 23, which directs the sheriff first to levy upon the goods and chattels of the defendant, if any there be, is for the benefit of the defendant and if he waived the benefit thereof, a sale of the defendant's land would be good though there were no return endorsed on the writ of "*nulla bona,*" and a return of *nulla bona* would not be necessary to protect him against an action for a false return at the instance of the plaintiff in the execution, provided he had made the money by a sale of defendant's land.

This motion against the sheriff of Madison county was tried before the Honorable J. Read, judge, at the April term, 1840, and

[Trigg vs. McDonald.]

judgment rendered for the defendants, from which there was an appeal in error. Every fact in the record necessary to elucidate the principles involved in the decision of the court is fully set forth in the opinion.

McCorry, for plaintiff.

Huntsman & Scurlock, for the defendant.

GREEN, J. delivered the opinion of the court.

This is a motion against the sheriff of Madison county, for a false return. The court below refused to render judgment against the sheriff, and the plaintiff appealed to this court. The bill of exceptions shows that an execution issued the 18th of February, 1840, in favor of the plaintiff against Richard McRee, Wm. A. Meacham and Joseph Cock for the sum of \$2,768 46, returnable the 4th Monday of April, 1840. The sheriff endorsed that said *fi. fa.* came to his hands the 25th of February, 1840, and on the 23d of March, 1840, was levied on various articles of personal property which were sold, and on the 23d of April, 1840, the sum of \$464 47 was paid to the plaintiff's attorney. Then comes the return complained of, which is as follows: "No further personal property, of either principals or endorsers to be found in my county, and there not being enough to pay the debt and costs in my opinion, I have levied," &c. A levy on a large amount of real estate is then set out, which was levied on too late for sale before the return of the *fi. fa.*

At the return term, this motion was made against the sheriff for a false return, and Joseph Cock, one of the defendants in the execution was introduced as a witness to prove that he was owner and had possession of negroes and other property more than sufficient to satisfy said *fi. fa.*, at the time it came into the hands of the sheriff, and that the said property was always open and subject to levy at his (said Cock's) house, four miles from Jackson, until the 18th of March, at which time said Cock took said negroes out of the State; that the sheriff did not come to his house to make a levy until some days after he had removed the negroes.

The plaintiff also proved by the clerk that he delivered the *fi. fa.* to the sheriff, eleven days previous to the date of the endorsement; that it came into his hands, and that the complainant said he was

[Trigg vs. McDonald.]

going over the river for electioneering purposes, and for that reason he could not attend to it then. The act of 1835, ch. 19, sec. 6, gives a motion against a sheriff for a false return.

We recognize the doctrine contended for by the counsel for the plaintiff in error, that the return must answer the whole writ. Watson on Shf. 69: 5 Law Lib. 50. But it does not follow that because the return must answer the whole writ, that therefore the return of *nulla bona* will be false, if it can be shown that the defendant was possessed of goods during any part of the time the sheriff had the writ in his hands. Such a doctrine would be absurd, for it would require the sheriff to perform impossibilities. Many writs of *fi. fa.* came into the hands of the sheriff on the same day; the parties to which may live in distant parts of the county. The sheriff must have some time to perform these various duties, and if any one of the defendants place his property beyond the reach of the sheriff before he can make the levy, he may return *nulla bona*, which will not be a false return. He must use reasonable diligence to execute the writ, and in an action for a false return, it would be for a jury to say under all the circumstances whether he had been guilty of such negligence as to constitute the return of "no property found" a false return. In Watson on the office and duty of sheriff, page 83, (5 L. Lib. 60,) it is said, "If the sheriff make a false return he will be liable to an action, as if he return *nulla bona* to a writ of *feri facias* when he had an opportunity to make a levy." And in the same book, page 119, (5 Law Lib. 143,) it is said, "If the defendant has no goods in the county into which the writ is directed, or if the sheriff is not informed of any that he has, he should return *nulla bona*." Thus according to this authority, to make the return of *nulla bona*, a false return, the sheriff must be informed that the defendant has goods in the county, and must have an opportunity to make a levy.

Upon this motion the court must determine the case upon the same principles that ought to govern a jury in an action for the same cause. And we are not prepared to say that because Cock had negroes unconcealed in four miles of Jackson, that the sheriff was informed of that fact, and had an opportunity to levy on them. The case would have been materially changed had the plaintiff proved that the sheriff lived at Jackson, and knew that the defendant in the execution had these negroes.

2. But it is extremely questionable whether the return in this

[Trigg vs. McDonald.]

case could be regarded in legal acceptation as a false return, if it had been proved that the defendant in the execution had other personal property which had not been levied on, and of which fact the sheriff had no cognizance. By our law the *fi. facias* issues against the goods and chattels, lands and tenements. The act of assembly which requires the sheriff first "to levy on the goods and chattels, if any there be" (1794, ch. 1, sec. 23,) is directory to him, and is made for the benefit of the defendant in the execution. If he waive the benefit, and wish the land to be first sold, a sale of the land by the sheriff would be valid, though there were no return on the *fi. fa.* of "no goods and chattels found." The plaintiff in the execution would have no right to dictate to the sheriff whether he should sell the defendant's land or negroes, and a return of *nulla bona* would not be necessary to justify him as against the plaintiff in the execution, provided he had made the money by a sale of the defendant's land.

In this case, the sheriff returns a levy upon a large amount of real estate, sufficient, for ought the court can see, to satisfy the execution. The levy ought to have been made in time to sell the land and make the money before the return of the *fi. fa.*, but in not doing this, the sheriff does not make a false return which subjects him to this motion, but may be guilty of negligence, for which he is liable to the plaintiff's action.

3. But in this case the sheriff made a part of the money, and paid \$464 47 to the plaintiff's attorney. It is laid down in the book heretofore quoted, (Watson on Sher. 204: 5 Law Lib. 147) that "If a sheriff return that he has levied part only of the sum directed to be levied on the *fi. fa.*, the plaintiff by receiving the money which the sheriff returns that he has levied, waives his action against the sheriff for a false return."

Upon all or either of these grounds, therefore, we think the plaintiff is not entitled to judgment on this motion. Affirm the judgment.

BRYAN, et als. vs. GLASS' SECURITIES.

1. Whether the bond given by a sheriff for the performance of his duties has been acknowledged and recorded according to law, must be determined by the records of the county court, and no parol proof can be heard on the subject.

2. Where the record of the proceedings of the county court set forth that the sheriff "came into open court and entered into bond and security as the law directs:" Held, that such entry (the record being presumed to speak the truth) embraces every thing the law requires, and is competent record evidence, that the bond was properly executed, acknowledged and recorded.

3. Where the clerk of the county court, by the order of such court, procured a book for the purpose of recording sheriff's bonds and other official bonds, and the bond of a sheriff was written out at length in said book by the clerk: Held, that said book was as much a record book as the minute-book, although the entry of the bond therein was not signed by the justices.

Bryan, Roadman & Heylin recovered a judgment against Vaught, Cowen & Emmerson for \$5,325 39. Execution was issued thereupon, which came to the hands of Glass, sheriff of Tipton county. Glass did not return the execution. For this delinquency a judgment was rendered against Glass and his securities, in favor of Bryan, Roadman & Heylin for the amount of the execution and damages thereupon. The securities obtained a writ of error *coram nobis* and a *supersedeas*, upon the ground, assigned as error, that the bond of the sheriff had never been *executed* or *acknowledged* by them, and had never been *approved* or *recorded* as required by law.

On the trial of this writ of error, a transcript of the minute-book of the county court was read, which set forth, that the sheriff "came into open court and entered into bond and security as the law requires." There was also offered a book in which had been entered the bond of the sheriff, Glass, and his securities, at length. To the competency of this registry of the bond, as exhibited in said book, the defendants objected. It appeared that the book in which the registry of the bond was made, had been procured by order of the county court, for the purpose of enrolling the official bonds of the county officers. That such a book had been kept in the office of the county court clerk since the organization of the county, by authority of the court, and that the clerk had enrolled the official bonds aforesaid in it, but that the justices of the court had never signed or tested the entries made in said book. Much parol

[Bryan, et als. vs. Glass' Securities.]

testimony was introduced by both parties on the subject of the execution of the bond, the acknowledgement, &c.

The circuit court reversed the judgment rendered against the defendants on motion, and gave judgment in favor of the securities. From this judgment Bryan, Roadman & Heylin appealed.

Wheatly, for Bryan, Roadman & Heylin.

McLanahan and A. Miller, for the securities.

TURLEY, J. delivered the opinion of the court.

At the June term, 1838, of the circuit court for Tipton county, the plaintiffs recovered a judgment on motion, against Samuel Glass, sheriff of said county, and his securities, for the sum of \$5,325 39 debt, and \$665 67 damages, for failure to make due and proper return of an execution in favor of plaintiffs against Daniel Vaught, William Cowan and Joseph Emmerson, upon a judgment rendered at the February term, 1838, of said court. The defendants, the securities of Glass, on the 8th day of May, 1839, filed their petition for a writ of error *coram nobis*, to reverse said judgment, upon the allegations that the bond upon which it was rendered had not been executed or acknowledged in open court, and had never been approved and recorded. These were assigned as causes of error, denied by the plea of the defendants in error, and issue taken thereon. Upon the trial it appeared by a certified copy of the records of the county court of Tipton, that Glass had been elected sheriff of Tipton county, and came into open court and entered into bond and security as the law requires, which bond was recorded in a book kept by the clerk of the court for that purpose, and is the bond upon which the judgment was rendered. This was held by the judge of the circuit court, not to be such an execution of the bond as to warrant a judgment by motion thereon; he, therefore, reversed the judgment rendered against the sureties, and the plaintiffs prosecute this writ of error thereon.

The act of 1777, ch. 8, sec. 2, requires that a sheriff shall enter into bond before the county court with two or more good securities in the penalty of twelve thousand five hundred dollars, payable to the Governor and his successors, which bond every county court is required and empowered to demand and take, and cause to be acknowledged before them in open court, and recorded.

[Bryan, et als. vs. Glass' Securities.]

Now the questions arising, are,

1st. Has the bond, which is the subject matter of this controversy, been acknowledged in open court by the parties who executed it?

2d. Has it been recorded?

We think the solution of these must depend upon and be answered by the records of the county court of Tipton, and not by parol proof. The record of the minutes of the court shows that the sheriff came into court and entered into bond and security as the law requires. This, it is argued, is not sufficient; that nothing can be taken by intendment in favor of a correct discharge of duty by the county court, but that every thing which the law requires to make the bond a good statutory bond, must be entered of record in express words: that is, that the record must show, *in totidem verbis*, that the bond was taken payable to the Governor and his successors, in a penalty not greater than twelve thousand five hundred dollars, with two or more good and sufficient securities, approved by the justices, acknowledged in open court, and recorded. To require all this would be a refinement in judicial proceedings, unwarranted, as we believe, by a single precedent, and totally at war with that practical sense which should always regulate the business transactions of life.

The county court is fully empowered to take bond and security from their sheriff. The law directs the mode in which it is to be done, and their record says that it was done as the law requires. This of necessity embraces every thing; and we must presume that the record speaks the truth; if it do, then the bond has been properly executed and acknowledged.

But it is said, secondly, that it has not been recorded. This argument is based upon the idea, that it should have been entered upon the minute-book of the court, and not in a separate book kept for that purpose. The statute is silent as to the place where the bond shall be recorded, and the minute-book is not the only record of the court; so there can be nothing in this argument. A book procured by the court, and appropriated to the recording of such bonds, becomes as much a record of the court for that purpose, as would the minute-book itself.

We are of opinion then, that there is sufficient record evidence that this bond has been executed with all the formalities of law.—There is no decision of our court in conflict with this opinion. The

[Bryan, et al. vs. Glass' Securities.]

case of *Goodwin vs. Saunders & Read*, 9 Yerg. 91, only determines that if a statutory bond is not taken in conformity with the statute, the summary remedy by motion, cannot be sustained, and that when the non-conformity is assigned as error, and *in nullo est erratum* is replied, it operates as a demurrer, and the error so assigned is admitted.

The judgment of the circuit court upon the writ of error, *coram nobis*, will, therefore, be reversed, and the judgment on motion, in favor of the plaintiffs against the securities, affirmed.

C A S E S
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE.

KNOXVILLE: JULY, 1841.

BROWN vs. DICKSON.

A levy in the following words, "levied on lot No. —, in the town of Greenville, with its improvements," is void for uncertainty, and a sale and deed made by virtue thereof, convey no title to the vendee.

Alexander Anderson recovered a judgment in the year 1828, in the county court of Green county, against George Brown, for the sum of \$147 60 and costs. A *fi. fa.* and *alias fi. fa.* issued on this judgment to Richard M. Woods, sheriff of Green county. Woods returned this *alias fi. fa.* to the June term, 1828, of said court, with the following endorsement made thereon :

"Search made and no personal property found in my county liable to be taken to make the money; I have therefore levied on all the right, title, and claim that George Brown has to lot No. —, in the town of Greenville, with its improvements, but not sold for want of time."

A *venditioni exponas* issued, and lot No. 7, in the town of Greenville, in Green county, was sold to plaintiff in the execution, and the sheriff Woods, by the direction of plaintiff, made a deed of conveyance of lot No. 7, in the town of Greenville, to said Dickson.

Brown was in possession of lot No. 7, in the town of Greenville, and refusing to deliver possession of it to Dickson, Dickson instituted an action of ejectment against him on the 13th May, 1833, in the circuit court of Green county. It was continued from term to term, till the January term, 1838, when it was submitted to a jury upon the proof, to wit, a copy of the record, including *fi. fa.*

[Brown vs. Dickson.]

and *venditioni exponas*, the deed of sheriff, with proof of notice, &c.

The judge, Powel, charged the jury, that if they believed the proof, the plaintiff was entitled to recover. The jury rendered a verdict for the plaintiff. A motion for a new trial was made by defendant and overruled, and judgment rendered. Defendant appealed in error to the supreme court.

J. A. McKinney, for plaintiff in error.

Lucky, for defendant in error.

TURLEY, J. delivered the opinion of the court.

The question presented in this case, is, whether a levy of an execution in the following words, is sufficiently certain, viz: "Levied on lot No. —, in the town of Greenville, with its improvements." In the case of *Vance vs. McNairy*, 3 Yerg. 171, it is held, that a levy on land is sufficiently certain, if it describe it in such a manner as to distinguish it from all other tracts owned by the same person.

In the case of *Pound vs. Pullen's lessee*, 3 Yerg. 338, the levy was in these words, "levied on eight thousand acres of land, lying in four different tracts." This levy was held to be void for uncertainty. The judge in delivering the opinion of the court, says, "This levy is bad for its vagueness and uncertainty; its location is not more definite than the bounds of the county of Stewart," (the county to which the execution was issued,) "and this restriction is only arrived at by implication, because the power of the sheriff did not extend beyond these bounds. The levy ought to show the location of the lands levied on to a reasonable certainty." This case, we think, is in point and must govern the one under consideration.

The levy in the case of *Pound vs. Pullen's lessee*, according to the exposition of the court, is this, "levied on eight thousand acres of land, lying in four different tracts, in the county of Stewart." The levy in this case, is "levied on lot No. —, in the town of Greenville, with its improvements." If the first be void for uncertainty, surely the last must be also. What tracts of land were levied on in that county? We know not. What lot was levied on in the town of Greenville? We know not. The levy in the first case, would cover any eight thousand acres of land, lying in four different tracts in Stewart county; and the levy in the last case, would cover any

[Fugate vs. The State.]

lot, with improvements, in the town of Greenville. This view of the case is not in conflict with the case of *Parker vs. Swan*, in 1st Humphreys. There the levy shows to whom the land belonged, the quantity of acres, and the location, to wit, the waters of the west fork of Stone's river. Now, it is impossible that there can be any uncertainty in this levy, unless by accident there should be two tracts of land owned by the same person, containing the same precise number of acres, and having the same location; a thing not to be supposed. We are, therefore, of the opinion, that the court below erred, in receiving the sheriff's deed, based upon this levy as a muniment of title in the plaintiff in ejectment, and that it ought to have granted a new trial.

The judgment will, therefore, be reversed, and the case remanded for further proceedings.

FUGATE vs. THE STATE.

1. Promoting and encouraging gaming is indictable by the statutes of this State.
2. An indictment for promoting and encouraging gaming, is sustained by proof of acts of gaming.

The grand jury of the county of Knox, indicted John Fugate, at the November term, 1840, of the circuit court for said county, of encouraging and promoting gaming.

The indictment charged, that John Fugate, in the county of Cocke, in the town of Newport, on the 17th November, 1840, "did unlawfully promote and encourage a game played at cards for money, contrary to the form of the statute," &c.

The defendant pleaded not guilty, and the cause was submitted on this plea, to a jury, at the March term succeeding, R. M. Anderson, judge, presiding.

It appeared in evidence, that the defendant did at the time and place mentioned in the indictment, with divers other persons, play at cards for money. Anderson, judge, charged the jury, that in misdemeanors there were no accessaries, but that all were principals, and that, although the proof might show that the defendant played at a game of cards for money, yet such proof would sustain this indictment, and that the defendant might be rightfully convict-

[Fugate vs. The State.]

ed upon such proof, of promoting and encouraging gaming. The jury rendered a verdict of guilty against the defendant.

On a subsequent day of the term, he moved the court to grant him a new trial, on the ground, that the testimony did not sustain the indictment. This motion was overruled. He moved also in arrest of judgment upon the grounds,

1st. That encouraging and promoting gaming was not an indictable offence by the statutes, but only subjected the offender to a penalty of five dollars, upon due conviction thereof before a justice of the peace.

2d. That there being no accessories in misdemeanors, the defendant should have been indicted as a principal for gaming, and encouragement and promotion of gaming, submitted in evidence.

This motion was overruled, and the defendant sentenced to pay a fine of five dollars, and costs of prosecution.

From this judgment he appealed in error.

Hynds, for Fugate.

Attorney General, for the State.

TURLEY, J. delivered the opinion of the court.

The plaintiff in error was indicted for the offence of promoting and encouraging gaming. Upon trial, the proof showed that he actually gamed. Upon this, two questions are made.

1st. Is promoting and encouraging gaming indictable?

By the 2d section of the act of 1784, ch. 18, it is provided, that any person who shall encourage or promote gaming, upon conviction before a justice of the peace, shall forfeit and pay the sum of five dollars. The 2d section of the act of 1824, ch. 5, makes it the duty of grand jurors, when they shall have a well-grounded belief, that the offence of gaming has been committed, to apply to the court for subpoenas, to bring before them any person or persons as witnesses, whom they may believe to have a knowledge of such offence; and such witnesses, when they appear, shall give evidence of any offence they may know against any of the statutes to repress and prevent gaming. Now, the act of 1789, ch. 8, is a statute to prevent and repress gaming: and as the act of 1824, ch. 5, makes it the duty of a witness, before a grand jury, to give information of any violation of its provisions, it follows, that if they

[The State vs. Caswell, et al.]

know of any persons who have encouraged or promoted gaming, it is their duty to inform on them. And for what purpose? Just to let the grand jurors know, without their having power to act? Certainly not; but with the view, that they may be presented and indicted. 5 Yerger, 144.

But it is said, 2ndly, that the indictment is for promoting and encouraging gaming, and the proof shows the offence to have been one of actual gaming, and, therefore, the allegation in the indictment, is not proven.

We cannot concur in this reasoning. If standing by and inciting and tempting others to game, be encouraging and promoting gaming, *a fortiori*, is the becoming an actual participator therein.

Let the judgment of the circuit court be affirmed.

THE STATE vs. CASWELL and HILL.

Two persons may be jointly guilty, and jointly convicted of the offence of retailing spirits.

The grand jury of Knox county, at the February term, 1841, of the circuit court for said county, indicted W. R. Caswell and Anderson Hill, for retailing spiritous liquors, contrary to the provisions of the act of 1837-8, ch. 120. The indictment charged, that "William R. Caswell and Anderson Hill, of Knox county, on the 1st day of January, 1841, with force and arms, in the county of Knox, unlawfully did vend and sell, in quantities less than one quart, a certain kind of spiritous liquor, called gin, to one William Swan, for a valuable consideration," &c.

At the June term succeeding, on motion of defendants' counsel, Scott, presiding judge, quashed the indictment, from which Reynolds, attorney general, prayed and obtained an appeal in error to the supreme court, on behalf of the State.

Attorney General, for the State, cited 4 Bac. Ab. 321, Dodd's Ed., Title Indictment. 2 Hawkins ch. 25, sec. 89.

Lyon, for defendants.

[Pickens vs. Delozier.]

TURLEY, J. delivered the opinion of the court.

This is an indictment against the defendants, for retailing spiritous liquors. The judge of the circuit court quashed the bill, because it was against two jointly, upon the ground, that the offence could not be jointly committed. In this, we think, he was mistaken. In minor offences, aiders and abettors are principals: therefore, if one procure the spirits for the purpose of retailing, and hire another to attend to the bar, as his servant, and he retails, both are guilty. To construe the case otherwise, would be to evade the statute, a fine being the only punishment prescribed for retailing, and irresponsible persons could always be procured, upon whom to cast the burden, while the owner, who could make satisfaction to the law, would escape.

Reverse the judgment, and remand the cause.

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PICKENS vs. DELOZIER.

1. The possession of part of a tract of land by A., who claims to the boundaries described in a written assurance, by virtue of which the same is held, (whether it purport to convey a legal or equitable title,) is a possession to the extent of the boundaries therein described.

2. A sale and conveyance of such land, or any part thereof, by one not in possession, or who has not received the rents and profits thereof for one whole year preceding such sale, is by the act of 1821, ch. 66, sec. 1, utterly void.

3. The possession of a party holding without written assurance of title, does not extend beyond his actual enclosures.

4. If A. is in possession of a tract of land by virtue of a deed or other assurance of title, which deed extends beyond the lines of an adjoining tract, the possession of A. does not extend beyond the part so included. A deed of the adjoining tract would, therefore, be void only for so much as was actually within the enclosures of the possession, or within the boundaries of the adverse deed.—Such adverse possession of part of the tract conveyed, would not vitiate the whole deed by act of 1821, ch. 66, sec. 1.

This action of ejectment was instituted in the circuit court of Sevier county, by Asa Delozier against Samuel Pickens, on the 20th July, 1839. It was submitted to a jury at the April term, 1841, Judge R. M. Anderson presiding, and under his charge a verdict returned for the plaintiff.

[Pickens vs. Delozier.]

A motion for a new trial being overruled, the defendant appealed in error from the judgment thereupon.

Peck, for Pickens.

Swan & Alexander, for Delozier.

GREEN, J. delivered the opinion of the court.

This is an action of ejectment, and the principal question is, whether a deed from Edward Delozier to Asa Delozier, for the land sued for, is void for champerty.

A grant for two hundred acres was issued to Edward Delozier, the 29th of January, 1827, and he conveys the same land to Asa Delozier, the 8th of August, 1834. At that time Pickens, who owned an adjoining tract, was in possession of a few acres of the land so conveyed, claiming it as part of his tract. Subsequently he extended his field and took in a larger quantity of Delozier's land, and on the 8th September, 1835, he entered a tract of three hundred acres adjoining his other tract, and including his said improvements. For the land so entered, he obtained a grant the 23d of October, 1837.

Upon these facts, the question is, whether the deed from Edward to Asa Delozier is void for champerty, and if it be, to what extent?

The possession of part of a tract of land, claiming to the extent of certain boundaries described in the written assurance, by virtue of which the same is held, (whether it purport to convey a legal or equitable title,) is possession to the extent of the boundaries therein described. A sale and conveyance of such tract of land, or any part thereof, by a person not in possession, or who has not received the rents and profits thereof for one whole year preceding such sale, is by the act of 1821, ch. 66, sec. 1, utterly void.

But if a party in possession of land, have no written assurance, legal or equitable, describing the boundaries to which he claims, but is a mere naked trespasser, having nothing to define the extent of his possession, but his enclosures, houses, &c., he is not *in possession* of any land beyond those enclosures, houses, &c. *Dyche vs. Gass*, 3 Yer. Rep. So, if the tract of land, of which he is in possession, by virtue of a deed or other assurance of title, extended beyond one of the lines of an adjoining tract and include part thereof, there is no possession of such adjoining tract beyond the part so included, or which may be actually occupied by enclosures.

[Caswell, et al. vs. The State.]

If, therefore, the adjoining tract be sold and conveyed by a person, not having possession thereof, the deed is void, only for so much of the land so conveyed, as may be included in the lines of a tract actually possessed, or which may be occupied by enclosures, but for the remaining portion of the land so conveyed, it is valid.

From this statement it follows, that Pickens' possession of the two hundred acre tract did not extend beyond the boundary of the George Snider tract, of which he was in possession, unless at the date of the conveyance to Asa Delozier, Pickens actually had enclosed and occupied any land beyond the lines of his George Snider tract. In either of which cases, Edward Delozier's deed to Asa, is void for such part *only* as was thus occupied, or included in the lines of the George Snider tract, and it is good for the remainder.

As the charge of the court to the jury is substantially in accordance with these views, there is no error in this record, and the judgment must be affirmed.

CASWELL and HILL vs. THE STATE.

Wine is not a spiritous liquor, and the sale of it in less quantities than a quart, is not indictable under the provisions of the act of 1837, ch. 120.

The grand jury of Knox county, at the February term, 1841, of the circuit court, Judge Scott presiding, returned an indictment against William R. Caswell and Anderson Hill, charging, that they "did vend and sell in less quantities than a quart, a certain kind of spiritous liquor, called wine, to one John Dameron, for a valuable consideration, contrary to the statute," &c,

The case was submitted to a jury at the same term, upon the plea of not guilty, and a verdict rendered against the defendant.

A motion for a new trial, and in arrest of judgment, being made and overruled, the court, Judge Scott presiding, fined each of the defendants \$12 50. From this judgment the defendants appealed in error.

Lyon, for plaintiffs in error.

Attorney General, for the State.

[Caswell, et al. vs. The State.]

TURLEY, J. delivered the opinion of the court.

The plaintiffs in error were indicted and convicted in the circuit court, for selling wine by less measure than the quart, and they prosecute this writ of error to reverse the judgment thereon.

The question for consideration is, whether wine is a spiritous liquor within the meaning of the statute, passed in the year 1837, ch. 120, making it a misdemeanor to retail spiritous liquors. We think it is not. Wine is a fermented liquor. Spirits are distilled liquors. And this distinction exists, not only in common parlance, but is recognized by chemists and philologists. Mr. Webster, in his 18th definition of the word spirit, calls it a strong, pungent, stimulating liquor, obtained by distillation, as rum, brandy, gin, whiskey. Wine he defines to be the fermented juice of grapes. Dr. Johnson defines spirit to be an inflammable liquor, raised by distillation, and wine the fermented juice of the grape. The word spirit is derived from the Latin word *spiritus*, one meaning of which is life. The discovery of the art of distillation belongs to the Alchymists, who made it in the course of their investigations after what they called the elixir *vitæ*, a liquid, the discovery of which, was to render man immortal. When by distillation they had procured pure alcohol, judging from its effects, they for a while were deluded by the hope that the grand secret had been discovered, and called it *aqua vitæ*, water of life. Brandy is still so called by the French *eau de vie*. The English in adopting a name, have taken the word *spiritus*, as the root from which to form it, instead of the more common word *vitæ*.

We, therefore, think that the words spiritous liquors, embraces all those which are procured by distillation, but not those procured by fermentation.

The judgment of the circuit court is reversed and arrested, and the plaintiffs in error discharged.

RICH, et als. vs. RAYLE.

A. issued a writ to Grainger county against B. where B. resided, a counterpart to Jefferson county against C. where C. resided, for a joint assault upon him; C. pleaded that the offence was committed in Grainger; that B. was not guilty, and that the writ was issued against B. in the county of Grainger to defeat the jurisdiction of Jefferson: Held,

1. That the action for assault and battery is a transitory action and not local in its nature.

2. That the enacting words of the act of 1820, ch. 25, sec. 3, is an affirmative statute, giving general power to institute joint actions where the defendants reside in different counties, and that the jurisdiction is based upon the residence of the parties.

3. That the limitation in the enacting words contained in the proviso authorising the jurisdiction to be defeated on two grounds, first, where a writ issued to a county where neither of the parties do in fact reside; second, where the suit is local in its nature, must be construed to disallow other matters of defence in abatement than those specifically enumerated.

4. That a matter in abatement as to one of the defendants, is matter in abatement for all, by the proper construction of this proviso.

5. The jurisdiction of the court cannot depend on the successful prosecution of the suit against a portion of the defendants.

William Rayle, a man of infamous character, who had been duly convicted of high crimes, and who was charged with and believed to have been guilty of almost every description of misdemeanor, such as burning store houses, stables, barns, stacks of grain, stealing farming utensils, hogsheads of tobacco and corn, stoning houses in the night, sinking ferry boats, stoning peaceable citizens on the highway, shooting and poisoning stock, and who had kept for a series of years the good citizens of the portion of Grainger county in which he resided, in a state of constant uneasiness and disquietude, and his conduct being no longer tolerable, he was arrested and seized without authority of law by the defendant Rich and a large number of the peaceable and industrious citizens of the neighborhood associated together, severely scourged with rods, and ordered to leave the State. This he did. For this assault and battery and imprisonment he instituted by his attorney this action in the circuit court of Jefferson county, on the 16th day of October, 1838, against John M. Coffin, James Deaderick and George Crosby, residents of Jefferson county, and against Joseph Rich and some forty other citizens of Grainger county.

[Rich, et al. vs. Rayle.]

The defendants, Coffin, Deaderick and Crosby, pleaded not guilty. The other defendants came in their proper persons and pleaded that they ought not to be sued or impleaded in the circuit court of Jefferson county by the plaintiff, because at the time of the commission of the several supposed trespasses set forth in the declaration, and for the period of six months preceding the commission of the said supposed trespasses, they had been and ever since continued to be, and on the suing out of the original summons in this case, were, and still are residents of the county of Grainger, and were not at any time residents of the county of Jefferson; and that the trespasses, if committed at all, were committed within the limits and jurisdiction of the county of Grainger, and not within the limits and jurisdiction of the county of Jefferson; and that Coffin, Crosby and Deaderick, residents of Jefferson county, were not guilty of the said supposed trespasses, and that no cause of action existed against them by reason of said alleged trespasses, and that the plaintiff had falsely, fraudulently, and with a view to defeat the jurisdiction of the circuit court of Grainger county, and to give jurisdiction to the circuit court of Jefferson, sued out the original summons in this case against defendants Crosby, Deaderick and Coffin.

Whiteside, one of the defendants, came into court and made oath that this plea was true in substance and fact. Peck, attorney for plaintiff, at the April term, 1839, filed a demurrer to this plea, and for special cause assigned that the affidavit was defective; second that the plea was double, containing inconsistent matter, matter in bar as to some of the defendants, and supposed matter in abatement as to others. Coffin, Deaderick and Crosby were acquitted.

The court, Anderson, judge, at the August term, 1839, upon argument, sustained the demurrer, and defendants had leave to answer over. They then filed a plea of not guilty, upon which issue was joined, and at the April term, 1841, Anderson, presiding, this issue was submitted to a jury, and upon the evidence introduced, the jury returned a verdict for \$500 against the defendants. A motion for a new trial being overruled, and also a motion in arrest of judgment, the defendants appealed in error.

Hynds and J. H. McKiney, for plaintiffs in error.

Peck, for defendant in error.

[Rich, et als. vs. Rayle.]

REESE, J. delivered the opinion of the court.

This is an action of trespass with force and arms, brought by the defendant in error against the plaintiffs in the circuit court of the county of Jefferson, for an alledged battery, wounding and false imprisonment of his person. The writ of summons *ad respondendum*, as to three of the defendants in the court below, namely, John M. Coffin, James Deaderick and George Crosby, was directed to the sheriff of Jefferson county, and of this writ, a counterpart, as to the balance of the defendants, was directed to the sheriff of the adjoining county of Grainger.

The three defendants above named, of the county of Jefferson, upon the return of the process, pleaded not guilty; and the other defendants filed a plea in abatement, alleging that they were resident in and citizens of the county of Grainger at and before the issuance of the writ; that the alleged cause of action took place, if at all, in that county, and that Coffin, Deaderick and Crosby were citizens of the county of Jefferson and resident therein, and were not guilty of nor had any participation in the alleged cause of action, but that the writ against them was issued falsely and fraudulently in order to draw the alleged cause of action within the jurisdiction of the circuit court for Jefferson county, and to cause the said defendants, citizens of Grainger county, to be there impleaded. To this plea the plaintiff below demurred, and the demurrer was sustained by the court, and thereupon the said defendants pleaded not guilty, and the statute of limitations, and a verdict was found in favor of the plaintiff below against a part of the defendants, citizens of the county of Grainger, but in favor of Coffin, Deaderick and Crosby, residents in the county of Jefferson. Reasons in arrest of judgment were filed by the defendants against whom the verdict had been rendered, which were overruled by the court and judgment given upon the verdict, to reverse which, this appeal in error has been prosecuted.

The 3d section of the act of 1820, ch. 25, enacts that, "in all cases where a suit may be required to be brought againsts two or more defendants, in any one of the courts of this State, who reside in different counties, it shall be lawful for the clerk of such court, and he is hereby required to issue a writ directed to his county in which one of said defendants may reside and, on application to issue a counterpart or counterparts of such writ to the sheriff of such coun-

[Rich, et als. vs. Rayle.]

ties where the other defendants may reside, which when executed and returned shall constitute a part of the original writ or leading process of such suit in the court to which the same may be returnable; *provided*, nothing in this section contained shall be so construed as to authorise suits to be brought in a county where neither of said defendants do in fact reside, nor so construed as to authorise suits which are local in their nature to be brought in a different county than that which is now required by law, but the same may be abated upon the plea of the defendant."

The case made out in the plea under consideration is not included within the terms of the above proviso, for although the plea alleges that the acts or wrongs constituting the cause of action were committed, if at all, in the county of Grainger, yet the cause of action is not local in its nature, but transitory; and the suit in the case before us was not brought in a county where none of the defendants did in fact reside, for the plea on the contrary, expressly avers, that Coffin, Deaderick and Crosby, against whom the original writ or leading process was issued, did in fact reside in the county of Jefferson. The statute did not intend that jurisdiction should be drawn to a county, where the defendant, upon whom the leading process or original writ was executed, might have been casually found, but did not in fact reside. But here, according to the statement of the plea itself, the fact of residence was as it should have been. There are but two grounds for a plea in abatement mentioned in the provisions of the statute; and it might well be urged, perhaps, that the maxim of *inclusio unius est exclusio alterius* applies to the case before us. It is worthy of remark that the cases put in the statute present grounds for the abatement of the entire suit, and furnish matter for a plea in which all the defendants could join. But in the case before us, Coffin, Deaderick and Crosby did not, and would not join in the plea, for the matter of the plea as to them would have been in bar, and would have constituted for them indeed nothing more than the plea of not guilty.— They, therefore, pleaded that plea in bar. If issue had been taken upon the plea of abatement, it might easily have happened, that after much delay and expense the issue in abatement might have been found for the defendants and the issue in bar for the plaintiffs, an untoward aspect of the case. It is urged that if this plea be held not to be good, much abuse may take place under the provision which allows of the issuance of counterparts. This may be so;

[Rich, et al. vs. Rayle.]

yet in general it is to be presumed that a liability to pay the costs of parties improperly made defendants, will sufficiently restrain the tendency to practice the abuse suggested; while, on the other hand, to allow such plea would lead to much delay, expense and difficulty, and obviate in the result all the benefits intended by the statute. But be the balance of inconvenience between the reception and rejection of such a plea as it may, it ought not to exert a controlling influence over the cause. If the grounds of abatement in cases of counterpart writs shall prove to be multiplied, legislative action on the subject will no doubt be invoked successfully.

This is shown by the act of 1827, ch. 75, sec. 2, which provides, that "if any joint action shall hereafter be brought on any bill single, bill of exchange, promissory note, or other negotiable instrument, service of the counterpart of the writ on the drawer thereof shall not be a good and sufficient cause to hold such drawer, maker or obligor to answer such action, unless the original writ shall have been executed on some one of the drawers, when there shall be more than one."

This was probably intended to correct an abuse which had grown up of nominal endorsement of negotiable paper, with a view to confer jurisdiction upon the court of the county in which such nominal endorser resided as against the real parties to the paper instrument. But this legislative provision would have been altogether unnecessary to correct the abuse in question, if the plea before us be good, for, then, the matter before the statute might have been pleaded in abatement. Much has been said as to the *form* of the plea in this case; which, of course, we have not considered, as we deemed the plea not good in substance. As in the judgment on the plea in abatement we find no error, *a fortiori*, it cannot be found in the action of the court upon the reasons in arrest of judgment. For the jurisdiction of the court, under the statute, cannot be made to depend upon the successful prosecution of the suit against the parties upon whom the original process was served. The judgment of the circuit court is therefore affirmed.

BULLARD vs. COPPS.

1. Where A. leases land of B., and subsequently disclaims his title and holds for himself or for another: Held, that the possession becomes adverse from the time such disclaimer is known to A. and seven years possession, after such disclaimer so known, bars the title of lessor.

5. It is champertous in A. to sell and convey land so adversely held, at any time after such disclaimer is known.

This action of ejectment was instituted in December, 1839, by John Copps against B. Bullard, for the recovery of the possession of one hundred acres of land, lying in the county of Claiborne.—It was submitted to a jury at the January term, 1841, of the circuit court of Claiborne, Judge Anderson presiding.

The plaintiff exhibited a grant for the land in controversy, from the State of North Carolina, to Joseph Beard, dated 15th July, 1793; a deed from Beard to John Bullard, in 1799; a deed from Bullard to Jacob Copps on 2d August, 1812; a deed from Jacob Copps, dated 3d of March, 1836, to John Copps, plaintiff, in the action.

The plaintiff also introduced a sealed article of agreement between Jacob Copps and John Powell, by which, on the 1st day of March, 1829, Copps rented the land to Powell for two years from that date.

The defendant introduced a deed from Jacob Peck by Adam Peck, purporting to be attorney in fact of Jacob Peck, dated 5th April, 1829. There being no power of attorney introduced, the court rejected the deed. The defendant was in possession of the land sued for in the action, and had been for several years. He was in possession, and holding adversely at the date of the deed, in 1836, from Jacob to John Copps. There was testimony going to show, that the defendant derived his possession by collusion with Powell, the tenant of Jacob Copps, by deed, dated in 1829.

Such are the material facts submitted to the jury, upon the points involved in this cause. The jury, under the charge of the court, (which is sufficiently set forth in the following opinion of the supreme court,) rendered a verdict in favor of the plaintiff in the action.

A motion for a new trial having been made by the defendant and overruled, he appealed in error to the supreme court.

[Bullard vs. Copps.]

J. A. McKinney and Peck, for Bullard.

Cocke, for Copps.

GREEN, J. delivered the opinion of the court.

This is an action of ejectment. On the trial, the court, among other things, charged the jury, "that if the proof satisfied them, that Powell was in as the tenant of Copps, and Bullard came in by collusion with Powell or under him, that Bullard would in law be considered as the tenant of Copps, and that Copps would not be bound, nor would the act against champerty be operative to show any title against him, until he (Bullard) had held adversely to Copps for seven years, after his disclaimer known to Copps."

In this part of the charge, the court erred. Although it is true, that a tenant cannot resist his landlord, by virtue of the statute of limitations, until after the expiration of seven years from the date of his disclaimer and adverse holding, yet it does not follow, as the court seemed to suppose, that the statute against champerty will not apply until after the expiration of seven years. The moment the disclaimer of the tenant is known to the landlord, his possession becomes adverse, and this *adverse* possession continuing seven years, the statute of limitations forms a bar to the landlord's recovery. But it does not require *any* length of adverse possession, to make a sale and conveyance of the land so possessed by another *champertous*. The fact, that it is adversely held, is enough. And *that fact* occurs in the case of a tenant, so soon as his disclaimer is known to the landlord.

2. The deed from Bullard to Copps, calling to begin "at the ford of Clinch river, known by the name of Copps' ford, on the north side of said river, running up the different meanderings of said river to the first gut below where William Hunter now lives, for compliment," "containing one hundred acres, *more or less*," includes all the land Bullard owned above the said ford, to the gut aforesaid. And, therefore, the land in dispute is included in the deed from Bullard to Jacob Copps, and in the one from Jacob Copps to lessor of plaintiff.

Let the judgment be reversed, and the cause be remanded for another trial.

CROCKETT vs. CAMPBELL, et als.

1. Deeds made after the commencement of a suit, confirming and ratifying deeds made before the commencement of the suit, are admissible evidence.

2. It is not necessary that the witnesses to a deed confirming a previous deed should say that the person signing the deed of confirmation was the identical individual who signed the deed intended to be confirmed. All that is necessary for them to prove, is, that the person who acknowledged the deed of confirmation was the individual whose name was subscribed to the paper which they were in the act of proving.

3. Where a power of attorney under which a deed was executed was defectively proven, a deed of confirmation cured such defective probate, and the power of attorney is admissible evidence, (notwithstanding such defective probate,) for the purpose of showing what acts the attorney was authorized to perform.

Andrew and Robert Crockett instituted this action of ejectment in the circuit court of Claiborne county, on the 9th day of April, 1829, against W. B. Campbell, A. Campbell, J. Campbell, W. P. Campbell, E. G. and A. Campbell, for the purpose of recovering lands lying in the county of Claiborne. After various continuances, the venue was changed and the trial of the case transferred to the county of Grainger, in May, 1832. After a mistrial, it was submitted to a jury at the January term, 1835. The jury under the charge of the Judge rendered a verdict in favor of plaintiffs for part of the land claimed. Upon this verdict judgment was rendered. The defendants appealed in error. The cause in the supreme court was reversed and remanded. See 8th Yerger, 228.

It was again submitted to a jury at the August term, 1839, Judge Anderson, presiding. It appeared that the land in controversy was granted to John Jones in 1787, by the State of Virginia, and lay between Walker's and Henderson's line, and was by the compromise in 1803, between the State of Tennessee and Virginia, placed within the jurisdiction of Tennessee. John Jones died having made his will. D. C. Jones, his administrator with the will annexed, made a power of attorney to Richard R. Jones on the 14th day of August, 1823, to sell all the lands of the deceased in the States of Virginia and Tennessee.

The probate of this power was defective. R. R. Jones made sale of land in controversy under it. The plaintiffs as part of their muniments of title introduced on the trial the above power of attorney and deed confirmatory thereof, executed on the 7th day of

[Crockett vs. Campbell, et als.]

February, 183'. This deed of confirmation purported to be signed by David C. Jones. It recited that a power of attorney had been executed by him in 1823 to R. R. Jones, authorising said R. R. Jones to sell all the lands which J. Jones, deceased, had claim to in Virginia and Tennessee, and that said R. R. Jones had made sales by virtue of said power of attorney, and that doubts had arisen as to whether said power had been legally authenticated so as to be evidence out of the State of Virginia, he therefore confirmed all sales made and acts done by virtue of said power, and for greater certainty appended thereto the said power of attorney.

Two witnesses appeared in court at the April term of the circuit court of Claiborne county, 1832, and testified that a man in the county of Amelia, State of Virginia, called and known as David C. Jones, executed this deed of confirmation for the purposes therein set forth.

These deeds were objected to as inadmissible evidence by the defendants, and the objection sustained and the deeds rejected. The jury rendered a verdict for the defendants. A motion for a new trial was made, and being overruled, judgment was rendered, from which the plaintiffs appealed in error.

J. A. McKinney, for plaintiff.

Robert McKinney, for defendants.

GREEN, J. delivered the opinion of the court.

This is an action of ejectment. On the trial below, plaintiffs offered in evidence as part of their chain of title, a deed of confirmation from David C. Jones, confirming the acts of Richard R. Jones, as attorney in fact for said David C. Jones, together with the power of attorney to said Richard R. Jones. To the reading of said deed, the defendants objected, and the court refused to permit them to be read.

1. It is insisted that this deed was properly rejected, because it is dated after the commencement of this suit. We do not think, that the *time* of the execution of the deed is material. The power of attorney to Richard R. Jones, (whose acts under that power are confirmed by this deed,) is dated anterior to the commencement of the suit; and as this deed of confirmation does not purport to convey

[Crockett vs. Campbell, et als.]

any thing, if the deeds confirmed were executed and properly proved and registered before the suit was commenced, they would pass the title by force of this confirmation, and vest it in the bargainee from their date. The deed of confirmation makes the acts of the attorney good at the date they were performed.

2. Objection is taken to the probate of this deed, because the witnesses do not say that David C. Jones, who executed this deed of confirmation is the very identical David C. Jones who executed the power of attorney to Richard R. Jones. This is certainly no part of the proof that witnesses to a deed are called upon to make. How, for instance, could the witnesses to a deed know whether the bargainer was the identical grantee to whom the land, he sells, was granted? All the identity that it is necessary for them to prove, is, that the person who acknowledges the deed before them, was the individual whose name was subscribed to the paper, the execution of which they witnessed, and were in the act of proving. This, they did prove. They say, that a man in Amelia county, Virginia, called and known as David C. Jones, executed the deed of confirmation.

3. It is insisted that the power of attorney should not have been received, because the probate thereof is defective. But the deed of confirmation recites this paper, and confirms the acts which had been done by virtue of the power it purports to confer. It is necessary it should be read, in order that it might be seen what acts Richard R. Jones was authorised to perform, and consequently, whether the deed executed by Richard R. Jones, was made in pursuance of the power, and was confirmed by the deed of the 7th of February, 1831. It was on account of the defect in the probate of the power of attorney, that the deed of confirmation became necessary. This deed of confirmation, therefore, was improperly rejected, and the judgment must be reversed and the cause remanded for another trial.

THE STATE vs. CAGLE and BOLING.

In an indictment against persons for living and co-habiting together in lewdness, it is not necessary that it should be charged that such living and co-habiting together in lewdness was notorious. The notoriety of such conduct constitutes no part of the offence.

At the April term, of the circuit court held for Sevier county, 1840, the grand jury indicted Elijah Cagle and Betsy Boling for the offence of lewdness.

The indictment charges that on "the 1st day of January, 1840, and upon divers other days between that day and the day of the filing of the indictment, Elijah Cagle, of the county of Sevier, laborer, and Betsy Boling of same county, spinster, being persons of evil disposition and designing to corrupt the morals of the people of the State unlawfully, openly and publicly did live, dwell and co-habit together in lewdness and adultery in the county of Sevier, they being unmarried to and with each other," &c.

The defendants pleaded not guilty to the charge, and issue was joined thereupon. At the August term, succeeding, the cause was submitted to a jury upon the evidence. The jury not being able to agree a mistrial was entered by consent, and the defendants recognized to appear at the succeeding term. At the December term, the cause was again submitted to a jury, who found defendants guilty as charged in the indictment. Upon motion of the defendants this verdict was set aside and a new trial granted them, and they were recognized to appear at the April term, 1841.

At the April term it was again submitted to a jury, Scott, judge, presiding. It appeared that Cagle was a resident of the county of Sevier; that he owned a tract of land upon which he and his family, consisting of a wife and several children, resided; that Betsy Boling, a single woman, had resided for several years upon the land of Cagle and continued to reside thereupon; that she lived in a house about a quarter of a mile from the dwelling house of Cagle; that she had three bastard children, two of which had been born during the residence of said Betsy on the land of Cagle; that Cagle's wife had become dissatisfied with the residence of said Betsy Boling on the land of her husband, Cagle, and had left the place and refused for a considerable length of time to live with Cagle; that Cagle had been seen to go to bed with Betsy; that he had been also with her under the shade of a tree alone in

[The State vs. Cagle and Boling.]

the woods; that Cagle paid the fees of the physician attendant upon Betsy at the birth of her last child; that his brother had expostulated with him on the subject of his conduct, and that he had said that he would do as he pleased. Such was the substance of the testimony introduced to the jury.

The court charged the jury, that the question before them was whether the crime charged in the indictment had been made out in proof, that they were the sole judges of the credit of witnesses, the weight of evidence and of what facts were sworn to by the witnesses; that if they were satisfied that the defendants had been guilty of the illicit and adulterous intercourse as charged upon them in the indictment, within twelve months preceding the finding the indictment, they should say so; that it was not necessary that proof should be introduced that the parties were actually seen in the act of adultery or that they were publicly detected; that it was not necessary that there should be any public exhibition of indecency to constitute the offence; that it mattered not how secretly the parties may have in fact perpetrated their acts of adulterous and unlawful intercourse, provided they lived and co-habited together openly and publicly.

The jury returned a verdict of guilty. A motion was made for a new trial. This motion was overruled. The defendants then moved in arrest of judgment on the ground that there was no indictable offence charged against them, it not being charged that the living and co-habiting of the defendants together was "notorious." The court sustained this motion and arrested the judgment.

From this judgment, Gray Garret, attorney general, appealed in error to the supreme court, and defendants were recognized to appear accordingly.

Attorney General, for the State.

Reneau, for defendants, relied on Crisham and Ligan vs. The State, 2 Yerg. 586.

REESE, J. delivered the opinion of the court.

Cagle and Boling were indicted and convicted for the offence of "unlawfully, openly and publicly dwelling and co-habiting together in lewdness and adultery, being unmarried to and with each other."

[The State vs. Cagle and Bohing.]

The judgment was arrested by the circuit court upon the ground that the living, dwelling and co-habiting together in lewdness and adultery, being unmarried, is not charged in the indictment to have been notorious. For the State it is urged, that if two persons of differing sex, live, dwell and co-habit together with the apparent relation of man and wife, without in fact being married, and therefore in lewdness and adultery, although the fact of being unmarried might not be generally known or notorious, the offence would be indictable without alleging or proving such notoriety, the *gravamen* of the offence consisting in the adulterous co-habitation of unmarried persons, and not in the general knowledge of the community of the negative fact of their being so unmarried. And this is probably correct. The allegation of notoriety, however, in the case before us, if necessary, is sufficiently made by the terms, "openly and publicly." We see no reason therefore, why, upon the ground suggested, the judgment should have been arrested.

But a writ of error on the part of the defendants has been prosecuted for the alleged misdirection of the judge in his charge to the jury, and for his refusal to grant a new trial. It is insisted that the charge of his Honor involves the position that a secret and single act of adultery, if proved, constitutes an indictable offence. Isolated expressions, or detached portions of the charge, considered separately might maintain the assertion. But the entire charge, fairly considered, in its scope and meaning, and with reference to the allegation and proof, leads us to believe that such was not the statement of the judge, and such could not have been the inference of the jury from what was said. We deem it unnecessary here, of course to extract the charge of the court, such being our conclusion as to its meaning. There is no pretence to ask for a new trial upon the facts proved.

The judgment of the circuit court, therefore, in arresting the judgment, will be reversed, and this court will render judgment upon the verdict of the jury.

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Rogers vs. Love, et als.

1. Where, from the nature of the agreement, a special demand is necessary, but the demand is not averred in the declaration, such omission will be cured by verdict, and the formal "*expius requisitus*" held sufficient; and this upon the ground, that a recovery would not have been suffered by the court, unless a special request had been shown in proof.

2. Where A. was the owner of a furnace, and B. of a forge, and A. agreed to furnish B. with five hundred tons of pig metal as B. should need such metal for manufacture: Held, that B. was not entitled to demand and have delivered to him the whole amount of five hundred tons at once, and that the obligation to supply was limited to the wants of B.'s manufactory, and that B. was bound from time to time to notify A. of the wants of his establishment.

William R. Love, one of the partners of the firm of W. R., James & Preston Love, having made an affidavit before the clerk of the circuit court of Sevier county, that they were unable to bear the expenses of the law-suit they were about to commence, and that they were justly entitled to the recovery of an amount within the jurisdiction of the circuit court, obtained a writ in covenant, against Micajah C. Rogers, on the 4th of August, 1838, in accordance with the provisions of the act of 1821, ch. 22, for the benefit of poor persons. N. & C. p. 533.

This writ was executed, and the court at the August term, 1838, appointed Hynds and Peck, attornies at law, by virtue of the provisions of the 2d section of said act, to prosecute the said suit for the benefit of said plaintiffs.

The declaration set forth a covenant, signed by Love & Brothers and by Rodgers, which recited, that Love & Brothers had on the 1st day of November, 1836, sold a furnace, in Sevier county, to Rodgers, and "in part consideration of such sale, said Rodgers binds himself to furnish said Love & Brothers with what merchantable pig iron they may be able to manufacture into bar iron or blooms, at their forge or forges, in Sevier county, not exceeding five hundred tons of pig iron per annum, to be delivered at the furnace aforesaid, as they may need them. And the said Love & Brothers on their part, agree to pay to said Rodgers, one ton of merchantable, well assorted bar iron, for every four tons of pig iron they may get of said Rodgers, payable quarterly, from and after the 1st day of April, at Pigeon Forge, or not more than that distance from Sevier-ville. That is, at the end of each quarter, they are to pay for what pig iron they may have had; and for a violation on the part of either,

[Rodger vs. Love, et als.]

the party in default, shall be liable in damages to the other. The said Rodgers further agrees to let the said Love & Brothers have what metal they may need for their own use at their forge, cast into hammers, plates, stands, &c., at the same price they receive pig metal; the said Love & Brothers paying the moulders for casting them the customary prices. This contract to take effect and remain in force for and during the term of eight years, from and after the 1st day of April next. For the true performance of which, the parties bind themselves in the penal sum of twenty thousand dollars to each other."

And the plaintiffs averred, that the defendant did not furnish the said plaintiffs what merchantable pig iron they were able to manufacture into bar iron or blooms at their forge, in Sevier county, not exceeding five hundred tons per annum, delivered to the said plaintiffs at said furnace as they needed them, from the 1st day of April, 1837, to the 1st day of April, 1838, according to the true intent and meaning of said agreement; and so the plaintiffs in fact say, that the said defendant, though often requested to keep and perform his said covenant with the plaintiffs, hath wholly failed and refused, to the damage of the said plaintiffs eight thousand dollars.

The defendant pleaded, that he had kept and performed his covenant, and upon this plea issue was joined.

The cause was continued till the August term, 1840, when it submitted to the jury, R. M. Anderson, judge, presiding.

It appeared, that Rodgers took possession of the furnace under the covenant, but that he failed to supply the forge with metal according to covenant, and that in the second and third quarters of the year, beginning on the 1st day of April, 1837, and ending on the 1st day of April, 1838, the plaintiffs received of the defendant some fifteen tons of pig metal. In the last quarter there were some twenty tons received, some of which was bad metal; that the plaintiffs had two fire-places in blast; that Rodgers failed to furnish the pig metal, and that in consequence the forge was idle a great part of the year, &c., and that if kept in employment during the whole year, the profits arising therefrom would have been some seven or eight thousand dollars.

There was much contradictory testimony submitted to the jury, in regard, to the profits of the establishment if supplied with metal, to the length of time the forge would have been necessarily stopped by low water, by the necessity of repairing, &c.

[Rodgers vs. Love, et als.]

It did not appear that there was a demand made at the furnace for the pig metal, but that a demand was made at Sevierville, in the county of Sevier, and information given, that the metal could not be got upon application at the furnace or elsewhere.

The jury, under the charge of the court, rendered a verdict in favor of the plaintiffs, for the sum of six thousand dollars.

A motion for a new trial was made by defendant and overruled, and a motion for an arrest of judgment was also made and overruled. The defendant appealed in error to the supreme court.

Swan, for Rodgers.

Hynds and Peck, for Love and Brothers.

REESE, J. delivered the opinion of the court.

This is an action of covenant. The covenant, among other things, recited that Rogers purchased of Love & Brothers their furnace, in part consideration of which, he bound himself to furnish them with what merchantable pig iron they might be able to manufacture into bar iron or blooms at their forge or forges in Sevier county, not exceeding five hundred tons of pig iron per annum, to be delivered at the furnace aforesaid, as they might need it. And the Loves on their part, agreed to pay to said Rodgers one ton of merchantable, well assorted bar iron, for every four tons of pig iron they might get of the said Rodgers, payable quarterly at Pigeon Forge, or not more than that distance from Sevierville. That is; at the end of each quarter, they were to pay for what pig iron they may have got. The breach assigned in the declaration is, that defendant, Rodgers, did not furnish plaintiffs below, with what merchantable pig iron they were able to manufacture into bar iron or blooms at their forge in Sevier county, not exceeding five hundred tons per annum, delivered to the said plaintiffs at said furnace as they needed them, from the 1st day of April, 1837, to the 1st day of April, 1838, according to the tenor and effect, true intent and meaning of said agreement, although often requested, &c. And to this declaration, the defendant pleaded "covenant performed."

Upon the trial, the court charged the jury, that the true construction of the covenant was, that the covenants were mutual and independant covenants. That the provisions of the act of 1807,

[Rogers vs. Love, et als.]

did not apply to the case; nor was a special request necessary, but the common request in the declaration was sufficient on the issue joined; that the defendant, by the terms of his covenant, was bound at all times from the 1st April, 1837, to 1st April, 1838, to have at his furnace the whole amount of the pig iron, not exceeding five hundred tons. And if the plaintiffs had at any time applied for the five hundred tons of pig iron at once, it would have been evidence that they needed it, and if it was not delivered, that would have been a breach of that covenant. The court also charged the jury, that it was not necessary for the plaintiffs to make out in evidence, that they had not received the pig metal, but that proof that it had been demanded at Sevierville, and information had, that there was no metal, would excuse a demand being made at the furnace, and amounts to a demand.

Plaintiffs obtained a verdict, and the defendant moved in arrest of judgment, which the court refused.

The question raised by the motion in arrest of judgment is, whether, where from the nature of the agreement, a special demand is necessary, but not averred in the declaration, such omission will be aided by verdict and the formal *sæpius requisitus* be held sufficient?

Of this we have no doubt, both upon reason and authority. It falls within the general rule applicable to such cases; it is the defective *statement* of a title, and not the statement of a *defective title*; and the omission is cured by verdict, upon the ground, that a recovery would not have been suffered by the court, unless the omission had been supplied in proof, and the special request shown. There is no error, therefore, in the refusal of the court to arrest the judgment. But we are satisfied that the charge of the court to the jury is erroneous, the court having misapprehended the meaning and legal effect of the covenant. It seems obvious, that the contracting parties, manufacturers of iron, the one owning a furnace of pig metal, and the other owning forges of bar iron, to be carried on through the year, could not, and did not, intend that so much as five hundred tons should have been furnished at once; because in the nature of things the one could not at once supply, or the other at once need so large an amount. The five hundred tons are the maximum of the aggregate amount to be distributively delivered at the furnace, in convenient quantities, throughout the

[Miller, et als. vs. Moore.]

year, as the same might, according to circumstances, be needed from time to time, by the manufacturer of the bar iron.

As Rodgers was not bound to deliver five hundred tons of pig iron during the year to the Loves, but only so much, not exceeding that amount, as they might need during the year at their manufactories, his obligation from time to time to supply, was necessarily limited by their wants, from time to time, to consume; and, therefore, from the nature of the thing, it was incumbent upon the Loves, from time to time, to notify Rodgers of the extent of their wants, and to demand, as needed, a convenient supply.

Entertaining these views of the meaning of the contract, and of the reciprocal duties of the parties to each other, it becomes necessary to reverse the judgment, and grant a new trial.

MILLER, et als, vs. MOORE, Chairman.

1. On a motion made on a collector's bond for unpaid balance of county taxes, it is not necessary that the county trustee should show that the bond was acknowledged before the county court and approved by that tribunal. The statute of 1835 only requires that the bond should be approved by the county court. Whether it was or was not approved by the county court is matter of defence.

2. Where the condition of collector's bond was to collect and pay over the county taxes without saying to whom, such bond would be valid notwithstanding, the law directing to whom the payment should be made.

3. The collector of county taxes against whom a motion is made for unpaid balance under the fourteenth section of the act of 1835, is entitled to a trial of the facts of his case by jury under the provisions of the fourteenth section of said act. If it be doubtful whether a defendant claiming the privilege of trial by jury under statutory provisions is entitled thereto, the defendant should have the benefit of that doubt, that mode of ascertaining disputed facts being so congenial with common law right and the cherished principles of our constitution.

4. The fact, that the court had discharged the jury at the time the application was made, is not good ground of refusal, for if the court had no power to summon a jury of talismen, a continuance should have been ordered.

Green Moore, chairman of the county court of Johnson county, by Brabson, attorney general, moved the circuit court of Johnson county, at the March term, 1840, for judgment against Miller, sheriff, and his securities for unpaid balance of the county taxes.

The attorney general introduced as testimony to the court a

[Miller, et als. vs. Moore.]

bond signed by Miller and others, payable to Green Moore, chairman of the county court of Johnson county and his successors in office, for the use of the county of Johnson, in the penal sum of \$2,344.

The condition of this bond was in the following words: "Whereas the above bound, R. Miller, is duly and constitutionally elected sheriff and collector of the county taxes for the county of Johnson for the year 1839, from the 1st Monday in August. Now if the said Miller shall collect all the county taxes due said county, which by law he ought to collect, and account for and pay over all taxes by him collected, or which ought to be collected, on the 1st day of December, 1839, then this bond to be void, otherwise to remain in full force and virtue."

On this bond was the following certificate: "I, Richard C. White, clerk of the county of Johnson county do hereby certify the within to be a true copy of the original which appears of record. Witness," &c.

The attorney general then produced the tax list and proved that a copy of it had been delivered to sheriff Miller, in due time as prescribed by the statute. This statement showed the aggregate of taxes due the county for 1839, to be \$1,972 30.

Upon this proof he demanded a judgment against the defendant and his securities. The defendants then demanded a jury. The jury for the term were however discharged, and the court refused the application and proceeded to hear the argument of the cause.

The defendant's counsel then urged that the attorney general had introduced no proof to show, 1st that the sheriff had collected the monies in the tax list, or any part thereof. 2nd. that the act of 1835, sec. 2, requires that the bond should be taken payable to the county trustee, and not being so taken it was not in pursuance of statute and no motion would lie upon it.

The court, Powell, judge, however, overruled the objections and after allowing the defendants certain credits for payments made, rendered judgment against them for the unpaid balance of \$811 28 [and 12½ per centum damages thereupon. From this judgment defendants appealed in error.

R. J. McKinney, for sheriff and securities.

Attorney General, for The State.

[Miller, et als. vs. Moore.]

RESEN, J. delivered the opinion of the court.

Various grounds of error have been alleged here on the part of the plaintiffs, as 1st, that the bond produced does not appear to have been taken by and before the county court, and acknowledged and approved, &c, and the case in 9th Yerger is referred to. But in that case the very point in issue was the acknowledgment in the county court, and it was shown negatively not to have been acknowledged, &c. Besides, the statute under which this bond was taken, directs only that it be approved by the county court and recorded. If it could be shown negatively not to have been so approved, the case referred to in 9th Yer. p. 11, would embrace it.

2nd. The condition of the bond is that the collector shall pay and account for the county taxes, &c., without stating to the trustee of the county. But where a bond was made payable to the treasurer of Tennessee, there being then no such officer, this court held that the word *West* might be supplied before Tennessee, because the law designated the person to whom the payment should be made, which, in principle, we think controls the point before us.

3d. But it is said that the defendants below were entitled to have had the facts found by a jury, if they so requested, and the record shows that such request was made; but it is said here, that this concession of a jury is contained in the 14th section of the act of 1835, ch. 15, which confers on the comptroller through the attorney general of the district on behalf of the State and in the name of the Governor, the right to make the motion for State taxes and this motion was made on the following or 15th section, which contains no such concession. The provision is "that in all cases, at the request of the defendant, a jury shall be empannelled by the court, who shall find the facts before the judgment shall be rendered." The comprehensive character of the phrase *in all cases*, and the reason of the thing applying with as much, if not greater force to county, than to State taxes, more than counteracts the argument arising from the mere order of place. Besides, if it were doubtful, the party claiming the concession should have all the benefit of the doubt, because claiming that mode of ascertaining disputed facts which is so congenial with common law right and the cherished principles of our constitution. And the fact, that when the application for a jury trial was made, the jury had been discharged, can make no difference, for if the court had no power

[Dobkins vs. The State.]

to summon a jury of talismen, still a continuance should have been ordered.

For this reason we reverse the judgment of the circuit court, and remand the cause for further proceedings.

DOBKINS vs. THE STATE.

1. To constitute gaming, there must be a wager, and the event upon which the wager depended, must be decided.

2. A charge in a presentment or indictment, that the defendant "bet upon a horse race," does not charge an offence, as such words do not *ex vi termini* import that the race was run.

Alexander Dobkins was convicted in the circuit court of Claiborne county, at the September term, 1837, of "betting on a horse race," and sentenced to pay a fine of five dollars and costs of prosecution. He moved the court to arrest the judgment, on the ground, that the presentment did not charge the defendant with any offence against the laws of the State, the defendant being charged only with "betting, unlawfully, twenty dollars on a horse race."

The court, R. M. Anderson, judge, presiding, overruled this motion, and gave judgment against him, from which he appealed in error.

Peck, for Dobkins.

Attorney General, for the State, cited *Bagley vs. The State*, 1 Humphreys, 486: *Bennett vs. The State*, 2 Yerger, 472: 2 Yerger, 281.

REESE, J. delivered the opinion of the court.

The indictment charged, that Dobkins and one Jones, "upon the 1st day of March, 1838, upon the plantation of Joseph McVay and William McVay, in the county of Claiborne, unlawfully did bet twenty dollars upon a horse race. And the jurors further present and say, that said horse race was not run upon a track or path kept for the purpose of horse racing." And, therefore, the plaintiff in

[Roach vs. Damron, et al.]

error, here enquires, was the race run at all, or upon any track? It is certainly not so averred in the indictment, unless the words "did bet upon a horse race," by their own proper meaning and force, announce that the race had "come off" or been executed. This court, acting in pursuance of the remedial principle prescribed by the act of 1824, ch. 5, sec. 5, for suppression of gaming, has held, that the words "did *gamble*" and "did *game*" contain and express, *ex vi termini*, the conjoint facts that a *bet* or *wager* was laid, and that the act to which it related was executed. This was going a good ways, and to the very verge. But here is the term "*bet*" upon a horse race, and to contend that the *event* or "coming off" of the race itself, as an act executed, is fairly involved in the meaning of the term, would be to stretch that term into an amplitude of meaning, violative of the language.

We are of opinion, therefore, that the judgment in this case rendered, must be reversed and arrested, and that the defendant go hence without day, &c.

NOTE.—For the various decisions of this State on the subject of gaming, see Cook's Rep. 383: Peck, 93, 196: Martin & Yerger, 127, 129, 262: 2 Yerg. 272, 472, 524: 3 Yerg. 469: 5 Yerg. 144, 184, 363, 367: 6 Yerg. 288: 9 Yerg. 184, 389: Meigs, 99: 1 Humphreys, 384, 486.

ROACH vs. DAMRON, et al.

1. Trespass *quare clausum fregit* is a local action, and the land upon which the trespass is committed, must be proved to ~~lay~~ lie in the county in which the action is brought. A verdict does not cure deficiency of proof in this respect. *lie*

2. The fact, that A. has personal property within the enclosure of B., does not authorise A. to enter the enclosure of B. for the purpose of taking his property. He should demand it of the owner of the land, and if he refused him permission to take it, such refusal would be evidence of a conversion, for which an action of trover would lie.

James Roach instituted an action of trespass *quare clausum fregit* in the circuit court of Knox county, on the 28th of May, 1840, against John Damron and George Arnold. At the June term, the plaintiff *declared*, 1st, that he was lawfully possessed of a certain tract of land, in the county of Knox, and that the defendants without right, with force and arms, entered upon the land,

[Roach vs. Damron, et al.]

threw down the fences, by which the land was enclosed, and thereby, fourteen head of cattle, belonging to the plaintiff, made their escape and were lost to the plaintiff.

2. That the defendants entered upon the premises, so enclosed by fences, with a wagon, horses and mules, and seised, took and carried away twenty loads of stone, of the value of two dollars per load.

The defendants pleaded not guilty, and issue was taken upon this plea.

At the February term, 1841, Judge Scott presiding, the cause was submitted to a jury.

It appeared in evidence, that one McCampbell being the owner of the land, told Graves and Hamer that they could have a quantity of stone situated on it, if they would get it out of the quarry in his woodland, then not enclosed. That said Graves did, by blowing, get a large quantity of it out, and piled it up. That McCampbell sold the place to McMillan, and before the sale, mentioned this circumstance to McMillan. That plaintiff took possession of the premises as tenant of McMillan, enclosed the woodland in which the rock lay and placed in it four head of beef cattle which he had bought in an adjoining county. That the defendants came with a wagon and team, and pulled down the fence and hauled away twenty loads of stone, of the value of one dollar per load. That they left the fence down one night and that the cattle, of the value of sixty dollars, during the period they were engaged in hauling, had made their escape and had not been recaptured.

The defendants proved, that they had purchased the stone so quarried at thirty-seven and a half cents per load of Graves and Hamer. That the stone could not be got at and hauled out by any other way, without incurring great labor and inconvenience. That they did not do any damage to the premises. That they generally put up the fence, and that the fence was insufficient to hold wild and unruly cattle, in many places. They further proved, that they carefully put up the fence when they finished hauling.

There was no testimony submitted to the jury, that this land lay in the county of Knox.

Judge Scott charged the jury, that the defendants had no right to throw down the plaintiff's fence and enter upon the premises to carry away the stone, and that the plaintiff had no right to recover the value of the stone.

[Roach vs. Damron, et al.]

The jury rendered a verdict for the plaintiff, for the sum of sixty dollars.

The defendants having moved the court for a new trial, and the motion being overruled, appealed in error to the supreme court.

Crozier and Anderson, for the plaintiffs in error.

Swan & Alexander, for defendant in error.

GREEN, J. delivered the opinion of the court.

This is an action of trespass, for breaking and entering the plaintiff's close. In its nature, it is a local action, the court of the county in which the land is situated, alone having jurisdiction. In such action, it is necessary that the venue be proved. A verdict will not cure a deficiency of *proof*. If, as argued, we were to presume that there was proof of this fact, because the jury have found a verdict affirming its existence, why might we not in every case, presume there was evidence sufficient to justify the verdict? If that were so, *no* new trial could be obtained on account of a deficiency of proof.

The record asserts, that it embodies all the evidence that was given in the case. There is in it, no evidence that the trespass was committed in Knox county. On that account, the judgment must be reversed, and a new trial awarded. There was no error in the charge of the court to the jury.

The fact, that one man has personal property within the enclosure of another, does not authorise the owner of such property, to enter the enclosure, for the purpose of taking such property in his possession. He should demand it of the owner of the land, and if he refuse him permission to take it, such refusal would be evidence of a conversion, for which an action would lie.

Let the judgment be reversed.

NOTE.—A circuit court of the United States cannot take cognizance of an action of trespass *quare clauum fregit* committed on lands within the United States, but out of the district in which the court is held. *Livingston vs. Jefferson*, 4 Hall's Am. L. Jour. 68.

On the second point—See 7 Bac. Ab. Dodd's Edition, Title, Trespass, p. 676: 2 Leigh's N. P. 1440: *Parker vs. Staniland*, 11 East, 226: 1 Leigh's N. P. 581: *Heermance vs. Vernoy*, 6 John. Rep. 5.

BRADLEY vs. COMMISSIONERS, &c.

1. The legislature established the county of Powell. This county did not, according to prescribed limits, contain three hundred and fifty square miles, as required by sec. 4, article 10, of the amended constitution of 1835: Held, that this was a void exercise of power and must be so declared by the judicial department of the State, when properly brought up.

2. The writ of *quo warranto* is the common law mode of redressing such grievances; but a court of chancery, as established upon its present broad and substantial basis, will interfere upon the principle of *quia tenet*, and use its process of injunction for the prevention of great and irreparable mischief.

3. Any person aggrieved by the proceedings, may apply for the remedy.

The 4th sect. of the 10th article of the amended constitution of the State of Tennessee, adopted in convention on the 30th of August, 1834, and by the voters in 1835, provides as follows: "New counties may be established by the legislature, to consist of not less than three hundred and fifty square miles, and which shall contain a population of four hundred and fifty qualified voters. No line of such county shall approach the court-house of any old county from which it may be taken nearer than twelve miles. No part of a county shall be taken off to form a new county or a part thereof, without the consent of a majority of the qualified voters in such part taken off."

In the year 1839, the legislature passed an act, (see pamphlet acts, ch. 15,) entitled, "An act to establish the county of Powell."

The first section provides, that "a new county be, and the same is hereby established, to be composed of fractions taken from the counties of Sullivan, Hawkins, Washington and Green, to be known and designated as the county of Powell, in honor of Samuel Powell, one of the judges of the circuit court of the State of Tennessee."

The second section gives the boundaries of the county, without specifying the number of square miles contained therein.

The third section appoints commissioners for the purpose of organizing the county, who were required to take an oath, and give bond for the performance of the duties enjoined upon them by the act.

The fourth section declares, that it shall be the duty of said commissioners, first giving notice in one or more public places, to open and hold an election at one or more places in each of the fractions

[Bradley vs. Commissioners, &c.]

proposed to be stricken off from the counties of Washington, Green, Hawkins and Sullivan respectively, for the purpose of ascertaining whether a majority of the voters residing in the several fractions were in favor of or opposed to the establishment of the county of Powell.

The act proceeds to provide for the laying off the county into civil districts, the location of the seat of justice, the erection of public buildings, the election of civil and military officers and the administration of justice.

The commissioners, to wit, Smith, Ball, Hulse, Shipley, Peoples, White, Gilman, Hendrick, England and Shanks, proceeded to the performance of the duties enjoined upon them by the act, held elections, and returned to the county court, that the decision of the voters had been favorable to the establishment of the county.

On the 29th day of January, 1840, Orville Bradley and Samuel McPheters, filed their bill in the chancery court at Rogersville, Hawkins county, praying a perpetual injunction against the organization of the county of Powell.

This bill charges, 1st. That a majority of all the qualified voters, residing in the several fractions, did not vote in favor of the establishment of the county of Powell, though a majority of those who did vote, were favorable to its establishment, and that the establishment of it would, therefore, be in opposition to the intent and letter of the constitution.

2d. That there are not within the boundaries of said county of Powell, as described by the second section of the act of 1839, more than two hundred and sixty square miles of territory, and that the 4th section of the 10th article of the constitution of 1835, provides, that "no new county shall be established, containing less territory than three hundred and sixty square miles."

3d. That the boundaries of the county of Powell, as laid down in the act of 1839, approached within less than eleven miles of the court-house of Green county, within about eleven miles of the court-house of Hawkins county, within less than ten miles of the court-house of Sullivan county, and so they charge, that said county cannot be constitutionally established.

4th. That they believe, that the establishment of the new county, as laid off, would reduce the county of Green below the number of six hundred and twenty-five square miles of territory, con-

[Bradley vs. Commissioners.]

trary to the 4th section of the 10th article of the amended constitution.

5th. That the complainants resided in, and were citizens of that portion of Hawkins county, which had been proposed to be stricken off and attached to the proposed county of Powell, and that they were about to be aggrieved thereby.

The bill, upon the premises aforesaid, prays, "that said defendants may be restrained by injunction from taking any further steps towards the organization of said county of Powell. That they be prohibited from holding any further elections, or doing any further act whatever, under the authority vested in them by virtue of the act of 1839, establishing the county of Powell;" and that inasmuch as the complainants had been informed, and believed, the defendants had threatened to cause the election of county officers to be made in defiance of any injunction that might be issued against their proceeding, they prayed, that J. S. Young, Secretary of State, might be enjoined from issuing any commission or commissions whatever, to any officer elected by virtue of the act of 1839, establishing the county of Powell. The bill further prays, that all persons who had been elected, or who might be elected officers under the provisions of said act, might be enjoined from the performance of any of the duties thereof, and that the contents of said county, as bounded in said act, might be more accurately and unquestionably ascertained. It also prays, that a survey be ordered, and that on final hearing a decree, awarding a perpetual injunction against all persons whatever proceeding to organize said county of Powell, might be made.

This bill was verified by the affidavit of Orville Bradley, on the 25th day of February, 1840, and on the 26th, the Honorable R. M. Anderson, one of the circuit judges, ordered the issuance of an injunction as prayed for in the bill of complainants.

On the 29th day of May succeeding, the defendants filed their joint answer to the bill. This answer denied all the material allegations of the bill.

The answer also denied the right of complainants Bradley and McPheters to call the defendants into the chancery court to litigate the questions involved in their bill, and denied the jurisdiction of the court to try and determine the same at the instance of said complainants.

[Brudley vs. Commissioners.]

On the filing of this answer, the defendants moved the court, Williams, chancellor, presiding, to dissolve the injunction.— This motion was overruled, the chancellor declaring, that though all the equity had been denied, yet in the exercise of the discretion vested in him, out of abundant caution, and in consideration of the embarrassing attitude of the case, and the irreparable injury that might result from the organization of the county, and the final perpetuation of the injunction, he deemed it proper to continue the injunction, as there existed no pressing reasons for a dissolution thereof.

The court appointed at the same term a competent surveyor to run the lines and make surveys, and report to the next term, whether the county of Powell, as described in the boundaries laid off by the act of the General Assembly, contained the constitutional quantum of square miles, and whether the said county, so laid off, reduced the county of Green below its constitutional quantity, and also whether the lines of the county so run, approached, nearer than the constitution permitted, the county seats of the others, Sullivan excepted, as provided by the constitution.

The complainants filed a general replication to the answer of the defendants, and at the May term, 1841, the cause came on for final hearing, Chancellor Williams presiding, when the following decree was entered :

“This cause coming on for hearing on this 27th day of May, 1841. before the Honorable Thomas L. Williams chancellor, on the bill of complainants, the answer of defendants, the report of Addison A. Armstrong, a surveyor agreed upon by the parties, as admitted in court, in lieu of the surveyor appointed by a former interlocutory order in this cause, and the depositions and proofs herein taken; and because it appears to the satisfaction of the chancellor, that there are not within the boundaries defined in the 2d section of the act, passed by the General Assembly of the State of Tennessee, on the 30th day of November, 1839, entitled, ‘An act to establish the county of Powell,’ three hundred and fifty square miles of territory; and because the chancellor is of opinion, that the lines of said county of Powell approach the court-house of Hawkins county, nearer than twelve miles, he doth order, adjudge and decree, that the said defendants be, and are hereby perpetually enjoined from doing any act whatever, under the authority vested in them by the said act, passed on the 30th November, 1839, tending

[Bradley vs. Commissioners.]

to organize or establish the said county of Powell, and that all acts and things heretofore done by them, are declared null and void.

“It is, therefore, ordered by the court, that the defendants pay all the costs of the cause, including the costs of the survey ordered by the court.”

From this decree, the defendants appealed to the supreme court.

J. A. & R. McKinney, for complainants.

Peck, for defendants.

TURLEY, J. delivered the opinion of the court.

This bill is filed by the complainants, to enjoin the defendants from organizing the county of Powell, the establishment of which is directed by the act of 1839, ch. 192.

The 4th section of the 10th article of the constitution of the State, provides for the establishment of new counties, to consist of not less than three hundred and fifty square miles, and to contain not less than four hundred and fifty qualified voters.

The proof in the case shows conclusively, that the boundaries of the county do not contain the constitutional number of three hundred and fifty square miles, but much less; and the question is, whether the commissioners can be prohibited, by the decree of a court of chancery, from organizing the county contrary to the provisions of the constitution.

The convention of the State, which formed the constitution, thought proper to place restrictions upon the power of the legislature to establish new counties; and of consequence, any attempt to do so, contrary to the restrictions, is a void exercise of power, which can and must be stopped by the judicial department of the State. There is no other place to which an appeal can be made, and if the courts cannot interfere, the constitution, if violated, is a dead letter.

But it is said, that the true remedy for this evil, is by writ of *quo warranto* and not by injunction.

To this we answer, if the courts have the power to remedy the evil, that remedy, which, under all the circumstances, will be most effectual, is the one which ought to be resorted to, if there is nothing in the mode of administering the law prohibiting it.

That the writ of *quo warranto* is the common law mode of re-

[Bradley vs. Commissioners.]

redressing such grievances is admitted, and that it was the only one which could have been used, before the system of chancery jurisprudence was established upon its present broad and substantial basis, is not denied. But that this remedy is inefficient, for the purposes desired, cannot be controverted. The writ of *quo warranto* is not a prohibitory writ, and before the question arising under it could be determined, much mischief could and would be done by the organization of the county, the thing sought to be prevented, and no subsequent action of the court could, by possibility, place the parties concerned, in their original, uninjured condition. It is this inability of courts of law to operate prospectively, by prohibition, for the prevention of mischief, that has established upon clear and definite grounds, that portion of chancery jurisdiction which rests upon the doctrine of *quia temet*. It embraces a great variety of interests, which we need not, and do not design to investigate here. It sufficeth for this case, to say, that it always applies, where great and irreparable mischief may be the consequence of illegal action, which the common law courts, from their mode of proceeding, cannot stay; such we think this one to be. If the establishment of the county be unauthorised, its organization ought to be prohibited, and this, no court but one of chancery can do.

It is submitted, whether one or two private individuals can seek the aid of a court of chancery for this purpose?

We think that any person aggrieved, by the proceedings, may apply for the remedy.

Let the decree of the chancellor be affirmed.

SHARP *vs.* WILHITE.

1. It is the duty of a judge to reject incompetent evidence in all cases, unless the incompetency thereof is expressly waived; where, however, it is admitted without objection, its incompetency is waived, and the court will not grant a new trial on account of the admission of it.

2. Where a plaintiff in a suit before a justice of the peace swore that his account was just and true, and that he had allowed all just credits, but did not state that there was no other person by whom he could prove his account: Held, the oath having been taken without objection, the incompetency of the plaintiff's evidence was waived, the oath was not extra-judicial, and the plaintiff was guilty of perjury in swearing to the account, if the oath was false.

3. It is not necessary to sustain a conviction for perjury that the oath under the book debt law should have been administered in the exact words of the act. All that is necessary is a substantial compliance with the prescribed form.

4. Where a declaration in slander alleged that the discourse of the defendant was had concerning a trial between plaintiff and defendant before M. Douglass, a justice of the peace, and concerning an oath the plaintiff took on said trial before said justice of the peace in proving his account: Held, that the declaration sufficiently showed the existence of a suit before a competent tribunal, and that the oath taken was as to a material matter in issue.

On the 21st day of January, 1839, Joab Hill, a justice of the peace for Campbell county, issued a warrant in favor of George W. Sharp against Thomas Wilhite, to answer the plaintiff in a plea of debt due by account. This warrant was returned before Matthew Douglass, a justice of the peace in the same county, on the 26th. The parties appeared and plaintiff, Sharp, proposed to prove the account by his own oath. Wilhite did not object thereto, but stated, that if he did swear to the account he would, swear a lie. The justice then administered the oath to the plaintiff, Sharp swearing that the account was just and true, and that there were no credits due on the account.

So soon as this was done, Wilhite stated that Sharp had sworn a lie. The justice rendered a judgment for the amount of the account, \$2 50.

On the 6th day of May, 1839, Sharp instituted an action upon the case in the circuit court of Campbell county against Wilhite. At the September term, 1839, the plaintiff filed his declaration in which he averred that "Wilhite on the 1st day of May, 1839, in the county of Campbell, in a certain discourse which said Wilhite then and there had in the presence and hearing of divers good and worthy citizens, of and concerning the plaintiff, and concerning a

[Sharp vs. Wilhite.]

trial that had been between the said plaintiff and defendant, before one Matthew Douglass, a justice of the peace for Campbell county, and of and concerning an oath which said plaintiff had taken on said trial before said Matthew Douglass, a justice of the peace as aforesaid, in proving an account of him the said plaintiff, on said trial, before said justice of the peace, then and there in the presence, &c., did falsely and maliciously speak and publish the following false and slanderous words of and concerning the plaintiff, and of and concerning his having proven his account by his oath before said justice of the peace on said trial, that is to say, 'you;' meaning the plaintiff, 'have sworn a lie knowingly.'"

The defendant pleaded, first, not guilty; second, that the supposed slanderous words charged in the plaintiffs declaration to have been spoken by him were true in substance and fact.

To the first plea the plaintiff filed a general replication, and to the second a general demurrer. At a special term, in September, this demurrer was argued, and sustained, and leave given the defendant on motion to amend his plea. At the same term the defendant filed an additional plea, in which he averred that a suit was pending before M. Douglass, a justice of the peace for the county of Campbell, in which said Wilhite was plaintiff, and defendant in this suit, was defendant in that, and that in said suit plaintiff was sworn as a witness for his own benefit, under and by virtue of the provisions of the act of the assembly authorizing parties in certain cases to prove their own accounts, and that said Wilhite did then and there depose and say, that his account was just and true, and that he had allowed all just credits, and that the said oath so administered and taken, was extra-judicial, and as administered, was taken without authority of law, &c. To this plea the plaintiff filed a general demurrer.

This demurrer was not disposed of; and at a special term in March, 1841, the case was submitted to a jury upon the facts above set forth, Judge R. M. Anderson, presiding:

His honor charged the jury that to entitle the plaintiff to recover, the oath, in the swearing of which the defendant charged the plaintiff with swearing falsely, must have been an oath for which, if false, he could have been convicted of perjury. His Honor read the book debt law *in extenso* to the jury, and told them (among other things not {excepted to}) that it was only by virtue of the provisions of this act, (N. & C. p. 131,) that a person was

[Sharp vs. Wilhite.]

authorised to prove his own account for goods, wares and merchandize sold and delivered, and for work and labor performed, and that if the oath was not administered in the words of the act of assembly it was an extra-judicial oath, for which, if false, he could not be convicted of perjury; that if the justice did not swear the person to the precedent fact necessary to make his testimony competent, to wit, that he had no means of proving his account but by his own oath, but only swore him that the account was just and true, and that he had allowed all just credits, that such an oath, if false, would not sustain an indictment for perjury, and no crime being charged, no action for slander was maintainable thereupon.

The jury returned a verdict of not guilty. The plaintiff having moved the court for a new trial and the motion having been overruled, the plaintiff appealed in error.

J. A. McKinney, for Sharp.

Garrett, for Wilhite.

GREEN, J. delivered the opinion of the court.

This is an action of slander for defamatory words spoken of the plaintiff by the defendant. The words charged to have been spoken are, "you, (meaning the plaintiff) have sworn a lie knowingly."

It appeared from the evidence, that the plaintiff had sued the defendant before a justice of the peace, and that on the trial he was sworn as a witness, and proved his own account, but he did not state that he had no other means of proving his account except by his own oath; nor was any objection made to his taking the oath, except that defendant told him he would swear a lie, if he swore to that account.

The court read to the jury the book debt law and told the jury, "that it was only by virtue of that act, that a person was authorised to prove his own account, either for work and labor done, or for goods, wares and merchandize sold and delivered; and that if the oath was not administered in the words of the act of assembly, it was an extra-judicial oath, for which a person could not be convicted of perjury, if the oath was false; that if the justice did not swear the person that he had no means of proving his account but by his own oath, but only swore him that his account as stated was

[Sharp vs. Wilhite.]

just and true, and that he had given all just credits, that would not be such an oath, for which, if false, he could be convicted of perjury, and that if he could not be convicted of perjury, an action of slander could not be maintained for saying he had sworn a lie in taking said oath."

1. We think the court erred in the charge to the jury. Although the witness was not competent to prove his own account, if he could prove it by another witness, yet, as the defendant waived the question of competency, the evidence of the plaintiff as to the justice of the account was as material as it would have been, had no objection to his competency existed.

This court decided, in the case of *Ewell vs. The State*, 6 Yerg. 364 that the reception of incompetent evidence without objection, was no cause for a new trial. It would certainly be inconsistent to hold, that a verdict produced by such evidence should stand, and yet, that if falsely given, the witness could not be convicted of perjury. A party has a right to waive all objection to the competency of a witness, who may be produced against him, and having done so, the evidence is as competent, and material as though no such objection had existed. This, however, does not dispense with the duty of the justice, or judge, to disregard in the one case, or reject from the jury in the other, incompetent evidence which may have been heard, unless the objection to its reception be expressly waived.

But the charge of the court, that "unless the oath were administered in the words of the act of assembly, it was extra-judicial," was erroneous, independently of the principle above stated. The adoption of such a principle would be ruinous to society. Perjury and slander would often find, in slight verbal variances from the prescribed forms of oaths, the means of escape from the condign punishment which justice invokes. Unquestionably, an oath administered, substantially, according to the prescribed form, will be valid, and if taken falsely, the party will be guilty of perjury.

2. But it is insisted by the defendant's counsel, that the plaintiff's declaration is bad, and that his demurrer to the defendant's plea reaches that defect. We think there is no defect in this declaration. The colloquium states that the discourse of the defendant was had concerning a trial between the plaintiff and defendant before M. Douglass, a justice of the peace, and concerning an oath the plaintiff took on said trial, before said justice of the peace, in proving an

[Sharp vs. Wilhite.]

account, as he lawfully might do. Now this statement sufficiently shows the existence of a suit before a competent judicial tribunal, and that the oath taken was as to a material matter in issue. Let the judgment be reversed and a new trial awarded.

C A S E S
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE.

NASHVILLE: DECEMBER TERM, 1841.

DAINS vs. THE STATE.

1. To sustain a conviction for a felonious and premeditated assault "with an intent to kill and murder in the first degree" under the 53d section of the act of 1829, ch. 23, it must appear that the assault was of such a character, and made under such circumstances, that, had the death of the person assaulted, ensued, the assailant would have been guilty of murder in the first degree.

2. To sustain a conviction for murder in the first degree, under the 3d section of the act of 1829, ch. 23, proof must be adduced to satisfy the mind that the death of the party slain was the ultimate result sought by the deliberate and premeditated will of the assailant. *Dale vs. State*, 10th Yerg. 551.

3. The employment of a deadly weapon, such as an axe, whereby death is produced, although it implies malice at common law, does not imply that the act was done with such premeditation as to make it murder in the first degree under the statute.

4. In criminal cases the supreme court will reverse and award new trials whenever in its judgment the verdict is not warranted by the proof. The rule, that the court will not disturb the verdict of a jury, unless a case of manifest rashness appear, is confined to civil cases.

W. K. Turner, for the plaintiff in error, cited and commented on the following authorities: 5th Yerg. 348: 10th Yerg. 552: Meigs, 277: 1 Hawkins, 630-4: 4 Black. Com. 191: 1 Russell, 151, 465.

Attorney General, for the State.

GREEN, J. delivered the opinion of the court.

The plaintiff in error was indicted in the circuit court of Dickson county, for an assault and battery upon John J. Albright with intent "unlawfully, maliciously and with premeditation to kill and

[Dains vs. The State.]

murder." He was found guilty by the jury, and sentenced to seven years imprisonment in the penitentiary. A new trial was moved for and refused, and the defendant appealed to this court.

From the evidence in the cause, as it is set forth in this record, it appears, that the defendant and the prosecutor, Albright, with others, were engaged on the day of the assault, at work, raising a house. In the evening the defendant had a fall from the house on which they had been working, and while down, Albright jocosely jumped upon him, and called for a lancet to bleed him. Some time after this, the defendant stepped up to the place where Albright was setting on a log, and "punched" him in the side. Albright said "dont Dains, you hurt me," upon which Dains desisted. Soon after this, and between sunset and dark, Dains stepped to get his axe, with which he had worked all day, and then with his axe upon his shoulder, walked to the table where the liquors were kept, with Albright, he having invited Albright to drink with him.

When they got to the table, Dains called for a glass of cider: Albright said he wanted stronger drink than cider, and while Dains was drinking his cider, Albright went behind him and "hunched" him with his knee, so that the cider was spilled over him, when Dains said "dont do that again," on which Albright slapped him on the shoulder, and Dains struck a violent blow with the axe upon the side of Albright's head, and knocked him down, giving him a dangerous wound. The parties had been drinking somewhat during the day, but had no quarrel, and were previously friendly.

This indictment is framed upon the 53d section of the act of 1829, ch. 23, which provides that "whoever shall feloniously and with malice aforethought, assault any person with intent to commit murder in the first degree," "though death shall not ensue, shall undergo confinement in said jail and penitentiary house for a period not less than three, nor more than twenty-one years."

In order, therefore, that the defendant should be found guilty of this charge, it must appear that the assault was of such a character, and made under such circumstances, that had death ensued, he would have been guilty of murder in the first degree, and liable to be condemned by the law to suffer death. But that a killing should be murder in the first degree, it must be done, as defined in the 3d section of the act, wilfully, deliberately, maliciously and with premeditation.

We are satisfied with the exposition which has been given of

[Dains vs. The State.]

these words in the act of assembly, in the case of *Dale vs. State*, (10 Yerg. Rep. 551,) and therefore need not discuss their meaning here. The court in that case say, "proof must be adduced to satisfy the mind that the death of the party slain, was the ultimate result which the concurring will, deliberation, and premeditation of the party accused sought."

Now apply this principle to the facts before us, and are they calculated to satisfy the mind, that the ultimate end sought by the concurring will, deliberation and premeditation of Dains was the death of Allbright? We do not think they are.

There was no previous quarrel between the parties. The jumping upon the defendant by Allbright, when he had fallen, and calling for a lancet to bleed him, was entirely jocular, though a little rough. Dains evidently intended no more by punching Allbright in the side, at the log, than to retaliate in the same way. As proof of this, the character of the blows, their immediate cessation, when told they hurt, then the friendly invitation to drink, are all concurring and irresistible circumstances. That he did not get his axe with a view to strike Allbright with it, is manifest from the fact, that if he had entertained such a purpose, he would, to carry it out, have done something to bring on the state of things, that he might suppose, would excuse him in striking. But no such thing occurred. He neither said nor did any thing calculated to bring on the state of things that existed at the time he struck. The fact, that he had picked up his axe, and had it on his shoulder when he went up to the table to drink, was perfectly natural, without referring to a design to use it improperly. The day's labor was over, the time then being between sunset and dark, and consequently the company was about breaking up, and each going to his own home. Doubtless that was Dains' design, and he was about taking his last drink before he left. These circumstances, coupled with the entire absence of proof, that he did any thing calculated to provoke Allbright, or to bring on a controversy, satisfy us, that the axe was not taken up, with any improper design, and therefore the case is left to depend entirely upon the circumstances that occurred at the table.

At the table when they went to drink, the conduct of Allbright was calculated to irritate. Dains called for cider, but Allbright said he wanted something stronger, and at the same time struck

[Dains vs. The State.]

Dains with his knee, so that he spilled the cider, and upon his telling him not to do that again, he struck him on the shoulder with his hand, and Dains instantly struck with the axe. These blows by Allbright, although without anger, were manifestly, from the proof, made with considerable force. After he had recovered from his wound, Allbright told Crane, (the witness,) that he had struck harder than he thought, but that he did it in fun. A severe blow by which a man is considerably hurt, although he may suppose the party inflicting it is not in anger, is calculated to irritate. It produces sudden heat, to receive an injury purposely inflicted by another for his amusement, and we think that in a gush of irritated feeling, thus produced, Dains struck the blow without premeditation, or calculating the mischief he might do.

The employment of a deadly weapon, although it implies malice at the common law, does not imply that the act was done with premeditation, so as to make it murder in the first degree under the statute, if death ensue.

The rule, that this court will not grant a new trial upon the facts, unless the jury shall appear to have been guilty of great rashness, does not apply to criminal cases. In such cases new trials have been constantly granted by this court, upon its conviction, that the verdicts were not warranted by the proof. In this case, we do not believe, from the facts in this record, that the defendant struck the blow with deliberate and premeditated design to kill the party stricken, and therefore had death ensued, we could not be satisfied to pass sentence of death upon him, without submitting his case again to a jury. Let the judgment be reversed, and a new trial awarded.

BANK OF ALABAMA vs. BERRY.

Plaintiff made affidavit that the defendant was justly indebted to him and that the defendant was according "to the best of his knowledge and belief removing privately out of the county:" Held, that this affidavit was a good affidavit under the 19th section of the act of 1794, ch. 1, and authorised the issuance of an attachment against the effects of defendant.

On the 13th day of October, 1841, in the county of Franklin, W. C. Roberts, agent of the branch of the bank of the State of Alabama, at Decatur, appeared before James Robinson, a justice of the peace of said county, and filed an affidavit as the agent of the said bank, for the purpose of getting an attachment against the effects of one John Berry. This affidavit stated that "John Berry is justly indebted to the branch of the bank of the State of Alabama, at Decatur, after giving him all just credits, the sum of sixteen hundred dollars by note, bearing date, &c., and that said John Berry is removing privately out of the county to the best of my knowledge and belief."

Robinson issued the attachment upon this affidavit, returnable to the circuit court held at Winchester on the 3d Monday in November, 1841. It was levied on the waggon, stock, household furniture, &c., of the defendant, and returned according to law. At the return, term the defendant moved the court to quash the attachment, which motion prevailed, and the court ordered the attachment to be quashed. From this judgment the plaintiff appealed in error.

J. Campbell, for the bank.

Taul, for the defendant.

REESE, J. delivered the opinion the court.

This case was commenced by attachment in the county of Franklin. The agent of the plaintiff in the affidavit filed, having stated the indebtedness of the defendant, adds, "that the said John Berry is removing out of this said county 'privately' to the best of my knowledge and belief." The question is whether this affidavit is sufficient? The 19th section of the act of 1794, ch. 1, provides, that upon complaint being made, &c., that "any person hath removed, or is removing himself out of the county, 'privately,' or so

[Bank of Alabama vs. Berry.]

absconds or conceals himself, that the ordinary process of law cannot be served on such debtor," &c., the attachment may be granted.

The statement in the case before us is, that the debtor was removing himself out of the county "privately," and the defendant insists that this is not sufficient, but that the words "ordinary process of law cannot be served," should have been added. In grammatical construction it is obvious that the word "privately" qualifies the phrases "hath removed" and "is removing," and that the subsequent words "ordinary process of law cannot be served," relate to and explain the meaning of the words "abscond" and "conceal." In its sense and legal construction, the first clause provides for a case of private change of domicil, past, or in the act of taking place, and the second clause for a case where, there being no change of domicil, the debtor yet "absconds" and "conceals" himself in a manner to prevent the serving of ordinary legal process. The defendant in the case before us has cited and relied on the case of *Dunn vs. Myers*, 3 Yerg. 414, and the plaintiff has cited and relied on the case of *Conrad vs. McGee*, 9 Yerg. 428. But an attentive consideration of the two cases will make it manifest, we think, that they are in harmony with each other. The first case, indeed, contains the following sentence: "Having 'removed' or being about to remove, are connected together in the first sentence of the 19th section, so as to mean, that the manner in which the one may have taken, or the other is about to take place, are the same, that is 'privately,' so that the ordinary process of law cannot be served." That the juxtaposition of these phrases is intended to intimate that they are of equivalent meaning, and not that they must both be set forth, is shown in the paragraph which immediately follows in the opinion of the court. Besides, the case of *Dunn vs. Myers*, did not turn, as did that of *Conrad vs. McGee*, upon the form of the attachment oath. We are of opinion, therefore, that the court below erred in quashing the attachment upon the ground stated.

SAUNDERS & MARTIN vs. GALLAHER.

1. At common law, the execution must pursue the terms of the judgment, and if the judgment be against two, and execution against one, such execution is irregular, and on motion, must be quashed.

2. When a positive statutory provision has been enacted, the benefits of which cannot be all attained without a modification of, or departure from common law forms, that modification must be adopted, or departure made, to the extent necessary to give effect to the legislative will, and, therefore, the act of 1831, ch. 40, sec. 5, which restricts the right to a *ca. sa.* to cases where an affidavit shall be made, &c., authorises the issuance of a *ca. sa.* against one of the defendants in a joint judgment.

3. When a defendant in a *ca. sa.* is arrested and gives bond for his appearance, and in accordance with the act of 1824, ch. 17, sec. 1: Held, that the giving such bond is a waiver of objections to the truth of the facts stated in the affidavit and the sufficiency thereof.

At the June term, of the circuit court of Wayne county, 1840, Saunders & Martin recovered a judgment against Gallaher & Alexander, for the sum of \$851 14 and cost.

On the 17th day of November, 1840, Saunders made an affidavit before the clerk of said court, "that he had been informed, and believed David Gallaher had means within his possession, or within his control, sufficient to pay the debt in this case, or a good portion thereof; which he fraudulently withholds from the payment of his debts."

On this affidavit, on the 21st of November, the clerk issued a *ca. sa.* against Gallaher. He was arrested, and gave bond, with William Pollard and W. P. Kendrick as his securities, conditioned as prescribed by the act of 1824, ch. 17, for the appearance of said Gallaher at the February term of the circuit court at Waynsboro', then and there to pay the money called for in the process, take the oath of insolvency, or make a surrender of his property.

The *ca. sa.* and bond were returned to the clerk's office, and at February term, (1841,) Totten, judge, presiding, the defendant moved the court to quash the *ca. sa.* This motion prevailed, and the *ca. sa.* was accordingly quashed. The plaintiffs appealed in error to the supreme court.

Fogg and Humphreys, for plaintiffs in error, cited, *Street vs. Vandervoort*, 7 Yerger, 438.

Meigs, for defendant in error.

[Saunders, et al. vs. Gallaher.]

REESE, J. delivered the opinion of the court.

In this case two questions arise. 1st. Whether, when a judgment has been rendered against two or more, a *capias ad satisfaciendum*, under the provisions of the act of 1831, ch. 40, can upon a proper ground being laid by the affidavit of the plaintiff, as to one defendant, be issued against that one only?

And, 2dly. When a *capias* has issued, and the defendant upon the arrest has given bond, pursuant to the act of 1824, ch. 17, judgment thereon can be refused, or the *ca. sa.* be quashed, because of the insufficiency or absence of the affidavit?

As to the first question, it is undoubtedly true, that at common law, and in general, the execution must pursue the judgment. But when a positive statutory provision has been enacted, the substantial benefits of which cannot be attained in some instances, without a modification of, or a departure from common law forms, that modification must be adopted, or that departure made to the extent only, that may be necessary to give effect to the legislative will.

To insist that the *ca. sa.*, as to the number of the defendants, must pursue the judgment, would deprive the creditor of the use of that process in many instances, where the fraudulent conduct of his debtor would by the terms of the statute entitle him, because such debtor might be associated as a defendant with those against whom he could not file an affidavit. One defendant is totally insolvent, but altogether honest; the other fraudulently withholds his money or conveys his property; if under our statute the process cannot depart from the judgment, the latter defendant is effectually protected by his connection with the former, from the issuance of a *ca. sa.*; or as has been suggested, one female defendant may protect any number of fraudulent co-defendants.

By the statute of 1831, the writ of *ca. sa.* is abolished in general; it continues to exist only *sub modo*, and it can issue only against such defendants as may be included in the application for its issuance by the creditor, grounded upon his affidavit. It, therefore, need not, because in all cases it cannot, pursue the judgment.

2ndly. When a *ca. sa.* has issued, and the defendant being arrested thereon, has given bond in pursuance of the provisions of the act of 1824, for his appearance at court, can he absolve himself from the performance of the *conditions* of the bond, and resist suc-

[Saunders, et al. vs. Gallaher.]

cessfully the rendition of a judgment thereon, by objecting to the insufficiency of the affidavit? The act of 1831 makes no reference whatever to the act of 1824. It does not provide for the taking of a bond; that is done by the proper force of the act of 1824.

The act of 1831 provides, that the defendant may at any time apply to the court, or the justice from whom the writ issued, to be discharged therefrom, which the court or justice shall do, if the defendant can make it appear that the plaintiff, his agent or attorney has sworn falsely, or was mistaken, or the grounds laid in the affidavit were insufficient to authorise the issuance of the writ. But if the party discharge himself from the writ, by giving bond pursuant to the act of 1824, shall he on the return of the writ and bond, go behind both, and investigate with the plaintiff, whether the affidavit contains false swearing, whether founded on mistake, or whether insufficient in the grounds laid?

It would hardly be contended, that he may enquire, under such circumstances, into the truth of the affidavit; then why into its sufficiency? In the case of *Street vs. Vandervoot*, 7th Yerg. 438, this court held, that the defendant in a *ca. sa.* waives any objection that may exist to the issuance of the *ca. sa.* by executing his bond, and undertaking to appear and discharge himself under the insolvent law. That authority is expressly in point, and is decisive of the question under consideration. We think that case was properly decided, and we adhere to the principle of it.

The judgment of the circuit court will be reversed, and judgment be given here upon the bond.

NICHOLSON vs PATTERSON.

1. A *scire facias* is founded upon a record, and recites nothing that is not of record.

2. The affidavit required by the act of 1831, ch. 40, sec. 5, constitutes no part of the record in the cause, and, therefore, a *scire facias* need not recite that an affidavit was made before the issuance of the *ca. sa.*

Meigs, for Nicholson.

Trimble, for Patterson, cited, 3 Marsh. Ky. Rep. 176: 2 Yerg. 533: 7 Yerg. 436: 2 Sellon's Pract. 134: 2 Ld. Ray. 1096: 6 Mod. 304: 16th Johnson, 119: do. 537: 13th Johnson, 547, 529: 3 John. Cases, 74: 11 Wend. 32: 2 Burrow, 7: Mass. 477: 5 Dowl. & Ry. 615: 6 Cowen, 596.

GREEN, J. delivered the opinion of the court.

This is a suit by *scire facias*, against the plaintiff in error, as bail for J. L. Napier, in an action at the suit of the defendant in error. The *scire facias* sets out and recites the writ of *capias ad respondendum*, the bail bond executed by the plaintiff in error, the judgment against Napier, the *capias ad satisfaciendum*, and return of "not found." The plaintiff in error failed to appear and plead to the *scire facias*, and judgment was rendered against him by default. This writ of error is prosecuted to reverse and arrest this judgment, because the *scire facias* does not show, that an affidavit was made by the plaintiff below, as required by the act of 1831, before the issuance of the *ca. sa.* This court decided, in the case of *Street vs. Vandervoot*, 7 Yerg. Rep. 436, that the affidavit required by the act of 1831, ch. 40, sec. 5, constitutes no part of the record in the cause. The opinion of the court, in that case, was reviewed, approved, and re-affirmed at the present term, in the case of *Saunders & Martin vs. Gallaher*.

The consequence is, that a *scire facias* need not recite, that an affidavit was made before the issuance of a *ca. sa.* A *scire facias* is founded upon a record, and recites nothing that is not of record. If no affidavit was made, and the defendant in the *sci. fa.* supposed the law required that one should be made in such a case as this, he should have availed himself of the omission, by pleading that fact to the *sci. fa.* He has failed to plead, and judgment by default has been rendered against him. It is now too late to come with the objection. Let the judgment be affirmed.

RAINES, Sheriff, vs. CHILDRESS.

1. If the return of a sheriff on a *fi. fa.* be not in point of law insufficient, that is, if it show an adequate legal reason why the money was not made, a motion will not lie.

2. If the sheriff has not used proper diligence, the remedy is by action.

3. Raines, sheriff, received an execution on the 30th June, 1841, returnable on the 13th September, 1841. The sheriff endorsed on the execution, that he levied it on a negro, &c., on the 1st day of September, 1841, and took a bond for the delivery of slave, &c. on the 13th, the return day. The bond for delivery of the property was forfeited, and the forfeited bond, with the *fi. fa.* was filed on the return day: Held, that no motion would lie on this return, as it showed an adequate legal reason why the money was not made.

This motion was made by Childress against Raines, sheriff of Davidson county, at the September term of the circuit court of Davidson county, 1841, for an alleged insufficient return of *fi. fa.* placed in his hands. Maney, presiding judge, rendered judgment against the defendant for the amount of the execution and damages.—Raines appealed in error.

The facts are stated in the opinion of the court.

Meigs, for sheriff.

Ewing, for Childress.

REESE, J. delivered the opinion of the court.

This is a motion, founded upon the act of 1835, chapter 19, section 6, against Felix R. Raines, sheriff of Davidson county, for an alleged "insufficient" return, on an execution sued out, by the defendant in error, from the circuit court of Davidson county, against Bell, Robinson, Cheatham and Brown. The execution was issued the 30th of June, 1841, bearing test of the 2d Monday of May, 1841, and returnable to the 2d Monday of September, (13th,) 1841. It was received by the sheriff on the day of its issuance, and the sheriff in his return states, that it was levied the 1st of September, 1841, upon one negro man named Lewis, one boy named Ben, one negro woman and child, and that he took bond for the delivery of the same on the 13th September, 1841, at the market-house in Nashville, with S. W. Napier security, which was forfeited, and therewith filed the 13th of September, 1841. It was proved before the circuit court, that Brown, one of the defend-

[Raines vs. Childress.]

ants in the execution, had from the 30th of June to the 13th of September, 1841, unencumbered personal property sufficient to satisfy the execution.

For the plaintiff in error, it is urged, that the return is legally sufficient, because it shows that the sheriff levied upon property apparently adequate to the satisfaction of the execution, in time to make a sale; that he took bond, as it was his duty to do, if required of him, for the delivery of the property, which being forfeited, constituted a good legal reason why the money was not made; that the return being legally sufficient, is a full answer to the motion; for that if it can be inferred, from the sheriff's return, or otherwise proved, that greater diligence would have made the money, the negligence of the sheriff, may constitute a ground of action against him, not of a motion under the statute. That the legislature intended to hold the sheriff liable, on motion, in cases only where the falsehood or insufficiency of the return appeared upon the face of the return itself, and not to make the motion a substitute for the common law remedy by action for negligence, or for a false return. That if they had so intended, it would have been impairing the right of trial by jury, and would have been a violation of the constitution.

On the other side it is said, that a return is insufficient, where, from the return itself, it appears probable, *prima facie*, that greater diligence would have made the money; that here the sheriff might have levied before the 1st of September, or if the state of his business would have prevented him, he might and ought to have shown what that state of business was, in the return itself, so as to make that appear.

We think the argument is with the plaintiff in error.

If the levy had been made the 1st of July, the sheriff might indeed have sold in ten days, but he was not bound, so far as liability to this motion is concerned, to do so; he might then have taken a bond, to deliver the negroes on the 13th September. If the return be not insufficient in point of law, that is, if it show an adequate legal reason why the money was not made, a motion will not lie; if it be thought, notwithstanding his return, that the sheriff has not used proper diligence, or that he has been guilty of negligence, the the remedy is by action.

Let the judgment be reversed.

GRANDISON, a Slave, vs. THE STATE.

1. To sustain a conviction of a slave under the act of 1833, ch. 75, sec. 1, and the act of 1835, ch. 19, sec. 10, it must be alleged in the indictment, by distinct averment, and proved that the assault committed by the slave, with the intent to ravish, was on the body of a *free white woman*. An assault on a black woman, with intent to ravish, is not punished with death, as in such a case of assault on the body of a free white woman.

2. A caption which does not state where the court was holden, at which the conviction was had, or that a grand jury, of good and lawful men, was empanelled, is defective, and the judgment must be arrested, for either of these causes.

Thompson, for Grandison.

Attorney General, for the State.

GREEN, J. delivered the opinion of the court.

The defendant was convicted in the circuit court of Warren county, of an assault and battery, with intent to ravish Mary Douglass, and was sentenced to suffer death.

The first count in the indictment, charges, that the defendant "did make an assault, and her the said Mary Douglass, then and there, violently and against her will, feloniously did ravish and carnally know."

The second count charges, that the negro slave Grandison, "did make an assault on her, the said Mary Douglass, then and there did beat, wound and ill-treat, with intent, her the said Mary Douglass violently and against her will, then and there feloniously to ravish, and carnally know."

This indictment is framed under the act of 1833, ch. 75, sec. 1, and the act of 1835, ch. 19, sec. 10. (Caruthers & Nicholson's Comp. Stat. 683.) The act of 1833, provides, that "if any negro or mulatto, whether bond or free, shall make an assault upon a *white woman*, with intent to commit a rape, and use violence to her person, such negro or mulatto, for such offence, shall suffer death by hanging.

The act of 1835, provides, that "any slave or slaves, who shall commit an assault and battery upon any free white person, with an intent to commit murder in the first degree, or a rape upon a *free white woman*, shall on conviction, be punished with death by hanging."

Both these acts make the offence of an assault and battery, with

[Grandison vs. The State.]

intent to commit a rape by a negro, capital, only on the ground, that such person so assaulted, with such intent, shall be a "*white woman*." Such an act committed upon a *black woman*, would not be punished with death. It follows, therefore, most clearly, that *this fact*, which gives to the offence its enormity, and on account of which, the punishment of death is inflicted, must be charged in the indictment, and proved on the trial.

But this indictment contains no such charge. It alleges, that the assault and battery was made upon *Mary Douglass*, with intent to ravish the said *Mary Douglass*.

Now, whether *Mary Douglass* be black or white, bond or free, the indictment does not disclose, and of course the court cannot know. The *name* imports nothing, and if it did furnish some slight ground to suppose that a female named *Mary Douglass* might be a *free white woman*, most clearly it could not be any ground for omitting the *express* allegation, of this material fact in the indictment.

As to the point suggested by defendant's counsel, that these acts, making the offence of an assault and battery upon a *white woman*, with intent to ravish her, by a negro, capital, does not, by the expression *woman*, include the case of an infant under ten years, we deem it unnecessary to decide, as the judgment must be arrested upon the ground just mentioned.

It may be proper to remark, that the caption to this record is wholly defective. It does not state *where* the court was holden, or that a grand jury, of good and lawful men, was empannelled. To presume that the court was holden at McMinnville, and that a grand jury was regularly empannelled, is going farther than any case has ever gone; and farther than we *can* go, consistently with that regularity and strictness which is required in criminal proceedings.

Let the judgment be reversed and arrested, and let the prisoner be remanded to the jail of Warren county to be proceeded against as the law directs.

DOUGHERTY, Adm'r. vs. CURLE, et als.

A sale of a slave by parol made in the State of Tennessee is void; and this is so though the slave were in the State of Alabama at the time of the making of the contract. The law of the place where the contract is made governs, and not the *lex loci rei sitæ*.

This bill was filed in the chancery court at Winchester, on the 8th day of February, 1840, by Elizabeth Ewing, against Curle and others, for the purpose of obtaining a perpetual injunction against the sale of a slave by execution. Mrs. Ewing sold to Moore a slave for \$1000, in December, 1838. Moore gave his note for the money. The parties to this contract were then resident in the State of Tennessee. Moore shortly afterwards removed to Alabama. Finding when the note become due, that he could not pay it, he came to the State of Tennessee, Franklin county, and, by parol, re-sold the slave to Mrs. Ewing, and in consideration of said re-sale she entered a credit upon his note for the sum of \$875. At the time of this contract the slave was in Alabama. In a short time Moore started him to the residence of Mrs. Ewing, in Franklin county. Curle had two judgments against Moore, rendered in the circuit court of Franklin county, one for the sum of \$700, the other for \$132, upon which he procured executions, and placed them in the hands of the sheriff of the county. As the slave passed, and before he reached the residence of Mrs. Ewing, the executions were levied on him by the sheriff.

Mrs. Ewing, thereupon, filed this bill to restrain the sale of the slave by injunction. She died, and the suit was revived in the name of Dougherty, the administrator of her estate.

The cause came on to be heard at the August term, 1841, on the bill, answers, replication and proof, Ridley, chancellor presiding. He being of the opinion, that no title passed from Moore by the parol sale, dismissed the bill of complainant. Complainant appealed.

Taul, for complainant.

Laughlin, for defendants.

TURLEY, J. delivered the opinion of the court.

In the year 1838, complainant's intestate, sold to J. H. Moore, a negro man at the price of \$1000, to be paid on the 25th day of De-

[Dougherty vs. Curl, et al.]

cember, 1839. At the time of the sale the parties were resident citizens of the State of Tennessee, but Moore early in 1839 became, by change of residence, a citizen of the State of Alabama, and carried with him the negro purchased as aforesaid. Moore finding it inconvenient to pay the purchase money on the 25th day of December, 1839, made a contract in the State of Tennessee with the intestate, by which he agreed to re-sell the negro to her for the sum of \$875, for which amount he received a credit on his note for the original purchase money. This contract was by parol, and no bill of sale was executed by Moore; the negro being in Alabama, was not delivered, but at a subsequent period was sent to the intestate; but before reaching her residence, was seised by executions on judgments in the State of Tennessee in favor of the defendant against Moore, and this bill is filed to enjoin the proceedings.

The question for consideration is, whether the sale of the negro by Moore to Mrs. Ewing, the intestate, is void under our statute of 1831, which requires that all sales of slaves to be valid, shall be in writing?

For the complainant it is argued, that this statute can have no bearing on the case, because Moore at the time of the contract was a citizen of the State of Alabama, and the negro, the subject of the contract, actually in that State.

This, it is replied, makes no difference, for though Moore was a citizen of Alabama, yet he made the contract in the State of Tennessee, and personal property being the subject of it, the *lex loci contractus*, and not the *lex rei sitæ*, must govern, as to the forms necessary to its validity. This is a question of authority.

Mr. Story, in his treatise on the conflict of laws, says, in sec. 342, "generally speaking, the validity of a contract is to be decided by the law of the place where it is made. If valid there, it is by the general law of nations, held valid every where." In sec. 243, he says, "the same rule applies, *vice versa*, to the invalidity of contracts; if void or illegal by the law of the place of the contract, they are generally held void and illegal every where." In sec. 260, he says "another rule respecting the validity of contracts is, that all the formalities, proofs or authentications of them, which are required by the *lex loci*, are indispensable to their validity every where."

In discussing these principles, the authorities cited, and examined, are civilians chiefly, but they are as much principles of the com-

[Elijah vs. The State.]

mon law, as of the civil. In sec. 372, of the same book quoted, the author says, "the general rule of the common law on this subject is, that in respect to moveables, the law of the place where the contract is made, will, with few exceptions, govern the forms and solemnities thereof. But as to immoveables, no contract is obligatory or binding, unless the contract is made with the forms and solemnities required by the local law, the *lex situs*."

These principles are decisive of the case under consideration. The contract for the sale of the slave having been made in this State, and our statute of 1831, making void all contracts for the sale of slaves unless they be in writing, and this having been by parol, it necessarily follows, the complainant's intestate acquired no right to the slave; he remained the property of Moore, and was subject to the executions of the defendant.

The decree is, therefore, affirmed, and the bill dismissed.

ELIJAH, a slave vs. THE STATE.

1. In order to sustain a conviction of a slave under the act of 1835, ch. 19, for an assault and battery, with intent to commit murder in the first degree, it must be alleged in the indictment and proven on the trial that the person assaulted was a free white person.

2. The name of the person assaulted furnishes no presumption that he was a free white person, neither does the fact that he was a witness in the case against the slave, nor that he was foreman in a mechanic's shop.

R. M. Burton and Trimble, for Elijah.

Attorney General, for the State.

GREEN, J. delivered the opinion of the court.

The slave, Elijah, was convicted in the circuit court of Smith county, for an assault and battery "upon David C. Puryear, being a free white person," with intent to commit murder in the first degree. This indictment was framed upon the 10th section of the act of 1835, ch. 19, (Car. & Nich. 683,) which enacts, that "any slave or slaves who shall commit an assault and battery upon any free white person, with intent to commit murder in the first degree, or a rape upon a free white woman, shall on conviction be punish-

[Elijah vs. The State.]

ed with death by hanging." The capital character of the offence created by the act, consists in the fact, that the person intended to be murdered by the slave, shall be a "free white person." The indictment so charges the offence. Without this charge the indictment would have been defective, as has been decided the present term in Grandison's case.

But, a fact that is essential should be laid in the indictment, and that constitutes the very *gravamen* of the charge, must also be proved. This is too plain a proposition to admit of argument.— But it has been suggested, that the exhibition of Puryear, as a witness, was sufficient evidence that he was white and free.

If the fact be so, perhaps such exhibition of the person before the jury, would have made it unnecessary for any witness to be called on to swear that Puryear was a white person and free; but the fact must appear in the bill of exceptions, or we cannot know that it existed. Upon the strictest scrutiny of the bill of exceptions, we are unable to detect any fact from which we can judicially infer that Puryear is a free white man. The *name*, as was said in Grandison's case, imports nothing, for negroes have such names. Nor does his office of foreman in a mechanic's shop, nor the fact that he was a witness in this cause, tend to prove whether he was black or white. Many negroes are conductors of mechanic shops, and several negro slaves were witnesses in this cause.

It would not do to say that we are not to presume, the jury would convict and the court would condemn the defendant, unless it had appeared, that the person he attempted to kill was a white man. The same argument might have been made in Ewell's case. In that case, there was no evidence that the offence was committed in Bedford county. * This was a necessary allegation in the indictment, in order to give the court jurisdiction; and this court held, that it must be proved, and that we could not presume that it had been proved, as the bill of exceptions, purporting to set out all the evidence, did not show it; so in this case, the bill of exceptions states that it contains all the evidence in the cause, and it does not show that it appeared to the jury that Puryear was a free white man.

As to the ground, which counsel has pressed upon the court, that the verdict was not justified by the proof in the cause, we think proper to express no opinion, as the judgment will be reversed upon another point, and we think it proper that the jury that may

* See 6 Yerger, 376.

[The State vs. Smith.]

hereafter sit in judgment upon the prisoner shall be uninfluenced by any opinion of this court upon the facts. Let the judgment be reversed, and a new trial awarded.

THE STATE vs SMITH.

1. The indictment charges that the defendant did make an assault by then and there drawing a pistol and threatening to shoot him, (the said Herring,) within the distance the said pistol would carry: Held, that this charge was good, it not being necessary that the indictment should charge that the pistol was pointed at the party assaulted.

2. If a person present a pistol at another, purporting to be loaded, so near as to have been dangerous to life, if the pistol being loaded, had gone off, this is an assault in law, though the pistol were not in fact loaded.

W. B. Johnson, attorney general of the 7th solicitorial district, presented, at the instance of Herring, prosecutor, a bill of indictment against Smith, to the grand jury of Montgomery county, at the September of the circuit court, 1840, for said county. This bill of indictment charges,

1. That Sidney Smith, on the 10th day of September, 1840, in and upon one James Herring did make an assault, by then and there drawing a pistol and threatening to shoot him the said Herring, within the distance the pistol would carry, &c.

2. That Smith, on the 10th day of September, 1840, an assault did make upon the body of one James Herring, by then and there drawing a pistol from his pocket and threatening to shoot him the said Herring within the distance the said pistol would carry.

The grand jury returned this a true bill. The defendant pleaded not guilty and was put upon his trial. He was found guilty by the jury. A motion was made in arrest of judgment and, Martin, presiding judge, arrested the judgment. Johnson, on behalf of the State, prayed and obtained an appeal.

Attorney General, on behalf of the State, cited Amer. Jur. No. 51, page 153.

Cook, for the defendant. The indictment for an assault with a gun must allege a presentation of the gun at the body, and that it was laden with powder and ball, in order to show an attempt to

[The State vs. Smith.]

shoot, and a present ability of shooting. If not presented at the body it is no assault, and if not within the distance the gun will carry, or the gun is not laden, no present ability exists to commit the battery. Dav. Precedents, 60: Roscoe's Criminal Evidence, 210: 3 Chitty Crim. Law, 826: 4 Wentworth, 7.

GREEN, J. delivered the opinion of the court.

The defendant in this case was indicted for an assault, convicted, and on motion the judgment was arrested. The district attorney on behalf of the State appealed to this court. The indictment charges, that the defendant "upon one James Herring in the peace of God and our said State, then and there being, did make an assault, by then and there drawing a pistol, and threatening to shoot him the said Herring, within the distance the pistol would carry. Two objections are taken to this indictment.

1st. It is said, that this indictment should have charged, that the pistol was pointed at the party assaulted. We do not think this statement necessary. The particular manner in which the weapon was held, with which a party made an assault, need not be stated. As if the indictment charge that the assault was made with a stick, it is never stated that it was raised in a striking manner, or if with a sword, that the point was presented, ready to thrust, nor need it state that a gun or pistol was presented, ready to shoot. If a party draw a sword, in a threatening manner, in striking distance, that is an assault; so in this case, the drawing a pistol in a threatening manner, in shooting distance, is an assault.

2. It is insisted that the indictment should have charged, that the pistol was loaded with powder and lead, so that the party assaulted was put in actual danger. Lately it has been decided in England, in two cases, "If a person present a pistol, purporting to be loaded, at another, so near as to have been dangerous to life, if the pistol being loaded had gone off, this is an assault in law, though the pistol were not in fact loaded." 9 Carr. & Payne, 483, 533: 20 English Common law Rep.: Amer. Jurist. No. 51, page 153.

In such case, all the injury occasioned by the terror which would be produced, or the breach of the peace that might ensue, would result that a loaded pistol would have produced. We therefore think the indictment in this case sufficiently charges the offence, and that the circuit court erred in arresting the judgment. Let the judgment be reversed.

HUNT & Co. vs. BENSON.

1. Hunt & Co. by the terms of a partnership agreement, were to furnish the capital. Benson agreed to conduct the establishment, to be liable for half the expenses and losses, and pay interest on half the capital furnished from the commencement to the termination, when the profits were to be equally divided: Held, under this agreement, 1st. That until the debts of the partnership were paid and the partnership settled, each partner had a lien on all the partnership property as his indemnity against the joint debts and his security for the ultimate balance due him. 2nd. That neither partner could without the consent of his co-partner or co-partners withdraw any portion of the funds of the concern for private purposes, (personal expenses excepted) or acquire an exclusive right to any portion of the stock until the debts were paid and the partnership settled.

2. Where real estate is purchased for partnership purposes, and on partnership account, equity deems it partnership property, no matter in whose name the purchase is made, or whether the legal title be in one or in all.

3. Where real estate is purchased and paid for with partnership funds, such payment will be decisive, in the absence of countervailing circumstances that it was intended to be held as partnership property.

4. If one partner withdraw the funds of the firm under such circumstances of consent, or knowledge and acquiescence on the part of the co-partners as to amount to a contract or loan, the property so purchased will not belong to the firm, but will be the private estate of the person so purchasing. It is otherwise if the circumstances do not amount to a case of contract or loan, although the partner may purchase for his own use and take title in his own name.

5. Where a partner withdraws partnership fund and appropriates it to private purposes, such as the purchase of real estate, and makes in the books of the concern full and fair entries thereof, which do not disguise the transaction and furnish to the co-partner full information of the true state of the facts, the consent of such co-partner, if he have access to the books, to the withdrawal and appropriation of the funds, will be implied unless he make objection at the time. His consent, however, could not be implied if he did not have access to the books, as where he resided a thousand miles from where the books were kept and the transaction took place.

Meigs, for complainants, cited, 2 Washington C. C. Rep. 441: 1 Sumner, 173: 3 Kent's Com. 52: Collier on P. 82, 96: 3 Kent, 36-7: Collier, p. 65: 2 Story Eq. sec. 1243.

Fogg, for defendant, cited, Carey on Par., 5 Law Lib. 67: 1 Sumner's Rep. p. 180: *Goodwin vs. Richardson*, 11 Mass. Rep. 475: 2 Dessausure, 239: Gow. on Part. ch. 2: 5 Vesey, 189, *Smith vs. Smith*: *Exparte Young*, 3 Ves. and Beames, 31: *Exparte Smith*, 1 Glyn and Jameson, 74: 2 Ves. and Beames 210, *Exparte*

[Hunt, et al. vs. Benson.]

Norris: Collier on Part. 565-6: 3 Dana's Rep. 243: 1 J. J. Marshall, 506: 7 Cranch, 3 Paige's Reps. 566.

GREEN, J. delivered the opinion the court.

This bill was brought to settle the copartnership account between the complainants and the defendant, their former partner. The complainants, who were conducting a large ready-made clothing establishment in Baltimore, entered into an agreement, dated the 23d of October, 1827, with the defendant, by which he undertook to come to Nashville forthwith, and conduct a ready-made clothing establishment for them, and that, at the end of six months, he might elect to become a partner in the establishment, or to receive compensation for his services and expenses. Should he choose to become a partner, the agreement provided, that the defendant was to "share and be entitled to claim and receive one equal half part of the profits arising from, or by the business of the said establishment, from its commencement until the same shall be discontinued, he the said Sylvanus E. Benson, bearing and paying one half of the expenses and losses incident to said establishment, and also paying and accounting to the said Samuel Hunt and John Patterson for the interest at the rate of six per cent per annum one on half part of the amount of capital invested by them in the business of the establishment."

A stock of goods was furnished by S. Hunt & Co., and Benson came to Nashville where he carried on a prosperous business for the concern. At the end of six months he elected to become a partner, and carried on the business in the name of "Benson, Hunt & Co." until April, 1838, when it was dissolved by consent. During the continuance of the firm Benson, employed a portion of the profits of the establishment in the purchase of property, consisting of a house and lot in Nashville, turnpike stock, insurance stock, Arkansas land, and several unimproved lots in Nashville, for all of which property he paid out of the funds of the firm upwards of eleven thousand dollars, and took the title in his own name.

The first question is, whether this property is to be regarded as belonging to the partnership, or as the private estate of Benson?

There is no controversy but that where real estate is purchased for partnership purposes, and on the partnership account, no matter in whose name the purchase is made, and whether the legal title be in one partner or in all, Equity deems it partnership property.

[Hunt, et al. vs. Benson.]

2 Story's Eq. s. 1207: Collyer on Partnership, 68. The circumstance that the payment was made out of the partnership funds, in the absence of countervailing circumstances, will be decisive, that it was intended to be held as partnership property. *Hoxie vs. Carr*, 1 Sumner's Rep. 180. But if one partner withdraw funds from the firm and invest them in property in his own name, and for his own private benefit, under such circumstances of consent or knowledge and acquiescence on the part of the co-partners, as to amount to a contract, or loan, the property so purchased would not belong to the partnership, but would be the private property of the person so purchasing. Collyer on Part. 566: *Hoxie vs. Carr*, 1 Sumner's Rep. 180: *Exparte Harris*, 2 Ves. & Beames, 213: *Carey* on Part. 5 Law Lib. 67: *Gow* on Part. ch. 2, sec. 1, ch. 5, sec. 2: *Exparte Young*, 3 Ves. & Beames, 31. On the other hand, although the partner may in fact purchase for his own use, and take the title to himself, yet if it be done under such circumstances that the knowledge and subsequent approbation of the co-partner cannot be implied, it may be regarded as partnership property, and taken into the account as such. Collyer on Part. 566: *Exparte Harris*, 2 Ves. and Beames, 214.

In *Exparte Harris*, (2 Ves and B.) Lord Eldon says: "I lay it down, that if in either the expressed or implied terms of an agreement for a partnership there is a prohibition of the act, and it is done without the knowledge, consent, privity or subsequent approbation of the other partner, and to the intent to apply partnership funds to private purposes, that is *prima facie* a fraud upon the partnership." Nor is the doctrine in *Exparte Smith*, (1 Glyn & Jameson Rep. 74,) opposed to the principle thus laid down by Lord Eldon.

In that case the vice-chancellor said, "If one partner be entrusted with the entire management of the partnership concern, and he withdraw monies for his separate use, which he duly and openly enters upon the partnership books, this is not a fraud, which will entitle the joint estate to prove against the separate; otherwise, if by entries in the books he disguises the transaction, or wholly omits and conceals it."

Here the making due and open entries in the books of the transaction, is stated to be sufficient to protect it as private property. Evidently this must mean to refer to a case where the co-partner has access to the books, and being enabled by these entries to know what

[Hunt, et al. vs. Benson.]

has been done, his consent will be implied, unless he make objection at the time. The closing remarks of the chancellor makes this view of the case quite clear, for he says, "It is otherwise, if by the entries on the books he disguises the transaction, or wholly omits or conceals it." Thus the omission to enter the transaction on the books, or making entries in such manner as to mislead the co-partner and prevent him, on an examination of the accounts, from acquiring explicit information of the facts, will constitute a fraud. So that this case results in Lord Eldon's proposition, that if partnership effects be withdrawn and vested in property by one partner for himself, without the "knowledge, consent, privity and subsequent approbation of the other partner, it is *prima facie*, a fraud upon the partnership, and the property so purchased may be taken into the account as partnership effects." But there can be no difference between the omission to make an entry of the transaction in the books, or so disguising it as to mislead, and failing to disclose the facts fully and distinctly to partners who reside at a great distance, and cannot possibly see the books. Of what value, is a full and open entry in the books, to a partner residing a thousand miles from the place they are kept, and who, in the nature of things, cannot inspect them? How would it tend to impart to him that knowledge, from which his assent or approbation might be inferred, and without which the party withdrawing the fund cannot acquire a separate title to the property purchased? All the cases, therefore, to which the defendant's counsel has referred, are to be understood upon a fair interpretation of them, as supporting the propositions above laid down. By the terms of this partnership, S. Hunt & Co. were to furnish the capital, and Benson was to conduct the establishment, and be entitled to receive half the profits of the business from its commencement until its termination, paying one half the expenses and losses, and interest upon one half the capital so furnished.

Now as Benson was to be entitled to one half of the profits, and be subject to half the losses and expenses from the commencement of the business until it should be discontinued, he could not, without the consent of his co-partners, withdraw any of the funds from the concern for private purposes, except to defray his necessary personal expenses.

In such a partnership as this, one partner cannot acquire an exclusive right to any part of the stock, until the partnership is set-

[Hunt, et al. vs. Benson.]

tled and its debts are paid. Then he is entitled to his share of the surplus. 3 Kent Com. 36-37, and authorities there cited. For until the debts are paid, and the partnership is settled, each partner has an implied lien on the partnership property, as his indemnity against the joint debts, and his security for the ultimate balance due him. 2 Story's Eq. sec. 1243. But if one partner without the knowledge or consent of his co-partners, may withdraw at pleasure what he may suppose will amount to his part of the profits, he may defeat his co-partner's lien, and leave him to pay the joint debts and get his portion of the surplus, as best he may, out of the remaining effects of the firm. This cannot be done; and therefore, unless Mr. Benson had the express or implied consent of his partners, to vest the joint funds in property for his private use and benefit, he cannot be permitted to withhold it from the account.

This leads us into an investigation of the facts in relation to this part of the case: 1st. As to the house and lot in Nashville, for which Benson gave \$3810. He says in his cross bill, that although this property was purchased with the joint funds, yet it was purchased for his private use, for a dwelling house; that open and fair entries were made upon the books, by which he charged himself with the money paid for this property; that he sent a balance sheet showing the state of the business to complainants, and that he wrote them a letter in which he fully disclosed the facts.

The answer admits the purchase, and the entries on the books as stated, and also admits that a letter was received from the defendant in which he stated that he had purchased a house, but it denies that the letter gave full and distinct information of the facts in relation to the purchase, but on the contrary, that complainants supposed the house had been purchased on the partnership account for the purpose of carrying on the business of the establishment; that said letter is lost and cannot be produced.

Golladay's deposition proves, that when Hunt was about filing this bill, he told witness that he received a letter from Benson, informing him of the purchase of the house. Judge Catron states in his deposition, that the parties conversed with him before the bill was filed; that Hunt said the house had been purchased without the knowledge of himself or Patterson, but that he afterwards heard of the purchase; that he did not assent or dissent until he came to Nashville, when he discovered the partnership notes had been given to secure the payment of the purchase money for the house, and

[Hunt, et al. vs. Benson.]

that the partnership money had been paid in taking up these notes, and that the law arising on these facts made it partnership property, he then claimed the profits on the re-sale as profits of the partnership.

Upon these facts, we do not think the partners of Mr. Benson at Baltimore had that knowledge, either express or implied, of this transaction, from which we have a right to infer their subsequent approbation of his acts.

It has been already intimated that the entries on the books of the firm at Nashville, however explicit and open, could give the partners at Baltimore no information, and that what is said in cases cited in argument about the sufficiency of such entries, applies only to cases where the co-partners are in a situation to ascertain the truth of the facts by means of these entries. But it is argued, that information was communicated by means of the balance sheet that was sent to the complainants. This is altogether a mistake, as the balance sheet only exhibits the gross amount due from each person, and does not specify the items of account. If it were to show the items, instead of being a balance sheet, it would be a copy of the books. Although, therefore, the balance sheet would show that Benson was debtor to the firm upwards of three thousand dollars, it would not show how that indebtedness was created. As to the admission of the answer, and Hunt's admission to Golladay and to Judge Catron, there is nothing to authorise the belief that the partners at Baltimore knew that Benson had purchased this house with partnership means for his own private use. His letter that he had bought the house, without stating how he had paid for it, and that he intended it for his own use and not for the concern, would fall under the principle laid down by the vice-chancellor in *Ex parte Smith*, (1 Glyn and Jameson's Rep. 74,) of "disguising the transaction." The fact might be, that he had bought it and paid for it from private funds, or that he had bought it for the concern. In either case they need make no objection. The depositions of Golladay and Catron prove no more than the admissions of the answer, and we think fall far short of proving the existence of that knowledge on the part of S. Hunt & Co. at Baltimore that would amount to a "contract or loan" of these funds to Benson, or a "subsequent approbation" of his act.

As to the Arkansas lands, the only information which was given was communicated in a letter to Patterson, in which Benson tells

[Hunt, et al. vs. Benson.]

him he had invested a few thousand dollars in lands in that country. It does not communicate the knowledge, that these few thousands were funds of the concern, nor does the letter state that the purchase was made for his own benefit. Subsequently, the defendant was at Baltimore, and mentioned something about his purchase of Arkansas lands to Hunt, who, without waiting to listen to the statement, abruptly told the defendant to go home and pay his debts and let Arkansas lands alone. Hunt evidently intended to discourage these speculations, and if he acquired any knowledge of the purchase, his manner would indicate that he thought these speculations had been made in behalf of the firm, and he did not wish its affairs involved in such a business.

In Hunt's conversation with Judge Catron, he seemed to regard these lands as of but little value, supposing that as good land could yet be obtained there at the same price. There is nothing in this conversation by which he admits that he had received such knowledge as would bind him, or by which he relinquishes any right to these lands.

As to the other sums laid out in property, there is no evidence that any information of any kind was ever communicated to the complainants. Upon the whole view of this part of the case, we are of opinion that all the property which was purchased by Benson with partnership monies, shall be taken into the account as partnership effects. If any of the real estate has been sold for a profit, the partners are entitled to share in profit.

We do not mean to say that Benson intended any thing wrong in these transactions; on the contrary, all the facts together satisfy us, that he supposed he was entitled to make the appropriation of the profits of the business in the way he did. But this private opinion on his part, does not change the view, that a court of equity takes of the transaction.

2. In calculating the interest upon the capital, the stock of goods laid in and sent to Nashville, when the establishment was first put in operation here, will be taken as capital, and interest will be calculated upon the one half of that amount up to the time of taking the account, and the amount will be charged to Benson and credited to the complainants.

The balance of the goods furnished the establishment here by S. Hunt & Co. will be regarded as purchases by the firm of Benson, Hunt & Co. from the firm of S. Hunt & Co. Interest will be char-

[Hunt, et al. vs. Benson.]

ged upon these goods as follows, namely: Upon all bills purchased from other houses than S. Hunt & Co. for the firm of Benson, Hunt & Co., interest will be charged from the time said purchases became due, according to the terms of the contract, up to the time of taking the account.

As to goods furnished by S. Hunt Co. in pieces, out of their own stores, interest will be charged from six months after the goods left Baltimore. Upon ready-made clothing, interest will be charged from the time the goods left Baltimore to the taking of the account. The house of Benson, Hunt & Co. will be credited with interest on all remittances to the House of S. Hunt & Co. from the time the payments were made until the taking the account.

When the whole account is settled and the debts are paid, S. Hunt & Co. will be entitled to the amount of their capital, (the value of the stock of goods first furnished,) and the surplus will be equally divided, and from Benson's share of such surplus will be subtracted the amount of the interest on one half said capital, which sum will be added to S. Hunt & Co.'s share.

So S. Hunt & Co. will have their capital originally furnished, and half the clear profits of the business, *plus* the interest on the half of said capital, and Benson will have half the clear profits, *minus* the interest on half the capital.

FRANKLIN AND COLUMBIA TURNPIKE CO. *vs.* CAMPBELL.

1. An act was passed for the construction of a turnpike road, entitled, "An act to incorporate the Franklin and Columbia Turnpike Company," and directing the commissioners, appointed to designate the route of the road, to select the shortest and best route between the towns of Franklin and Columbia: Held, that the intent of the legislature, as derived from the terms of the said act was, that the road should run from the limits of the corporation of one town to the limits of the corporation of the other.

2. The charter of the Franklin and Columbia Turnpike company authorised the erection of a toll gate within two miles of Columbia, when the road should be completed seven miles from the limits of the corporation: Held, that such company had no right to establish the gate until the terms of the charter had been complied with, by the completion of the road to the limits of the corporation; and although established upon the warrant of the Governor, such company had no right to exact toll.

3. The warrant of the Governor, reciting certain facts, and authorising the establishment of a gate, is *prima facie* evidence of the facts recited therein; and the establishment of a gate by warrant of the Governor, is not conclusive evidence of the right to demand and exact toll.

4. Corporations are created for the public good: the profit they are permitted to make, is only intended to induce them to labor for the public good, and to remunerate them for that labor. See article 11, sec. 7, of the constitution.

5. Where the charter directed, that the route should be the shortest and best route between the towns of Franklin and Columbia, and the route is designated by commissioners, the road completed, examined, and gates established upon the warrant of the Governor: Held, that these facts are conclusive that the route selected is the *nearest and best route*, so far as the right to exact toll is concerned.

6. If, however, the deviation from the route is manifest and flagrant, and the freehold of an individual is injured thereby, the individual so injured, would have the right to restrain the company by injunction from such gross departure from the terms of the charter.

This case was tried at the September term, 1841, in the circuit court of Maury county, Judge Dillahunty presiding, and resulted in a verdict for the defendants, and judgment in accordance therewith. The President and Directors of the Company appealed in error.

All the material facts in the cause, are set forth in the opinion of the court.

Fogg, for the plaintiffs.

Nicholson, for Campbell.

[Franklin and Columbia Turnpike Co. *vs.* Campbell.]

GREEN, J. delivered the opinion of the court.

The legislature of this State, by act of 1831, ch. 68, p. 59, incorporated a company to construct a turnpike road from the town of Franklin to Columbia. That act referred to the act of 1829, ch. 205, p. 159, for the powers, privileges, and liabilities to be enjoyed and incurred by the said companies.

Under this act the road was not constructed, and the legislature, by the act of 1835, ch. 14, p. 101, revived the former act, appointed other commissioners, and for the powers and privileges to be enjoyed, and liabilities to be incurred, they again refer to the aforesaid act of 1829, incorporating the Nashville and Franklin Turnpike Company, and declare that this company shall possess the same. The proviso of the fourth section of the act of 1835, makes it the duty of the commissioners, appointed to designate the route of the road, "to run it along the shortest and best route between the towns of Franklin and Columbia." The fifth section provides, that the corporation may establish toll gates not exceeding five, but that no gate shall be in less than two miles of the towns of Franklin and Columbia.

By the 7th section of the act of 1829, before referred to, it is provided, that the road shall be constructed as therein particularly described; and when finished or completed for the distance of at least seven miles from the town of "Franklin" or "Columbia," the President and Directors may apply to the Governor of the State, whose duty it shall be to appoint three commissioners to view and examine the road, and on a report of the majority of said viewers, that the road had been completed for the said distance as directed in the act, the Governor should issue his certificate, authorizing the erection of two toll gates, one within two miles of the town, and the other in five miles of the first gate; and for each additional five miles that might thereafter be completed, upon a similar report of viewers, and certificate of the Governor, an additional gate might be erected.

On the 26th day of February, 1840, the Governor issued his certificate, reciting, that it had been certified to him by two of the commissioners appointed to view and examine twelve miles of the Franklin and Columbia turnpike road, commencing at "the end of the Columbia bridge;" that twelve miles of said road, commencing as above, had been completed; he, therefore, authorised the com-

[Franklin and Columbia Turnpike Co. vs. Campbell.]

pany "to erect toll gates on that part of the road so completed and finished as aforesaid, according to the provisions of the charter." A gate was then erected on the road at the distance of two miles from Columbia, and the other distances specified. During the month of May, 1840, the defendant passed through the gate, in two miles of Columbia, and refused to pay the toll that was demanded. He was sued in the name of the company, for the amount of said toll, (25 cents,) before a justice of the peace, where judgment was given against the company. An appeal was taken to the circuit court of Maury, where a verdict and judgment were rendered for the defendant, and the plaintiffs appealed to this court.

On the trial in the circuit court, it appeared in evidence, that the end of the Columbia bridge, at which the commissioners commenced viewing the road, and to which, for twelve miles towards Franklin, the Governor certified it had been completed, is not the boundary of the town of Columbia; that from the point at which said road, as constructed, terminates, to the town of Columbia, the distance is one hundred and fifty yards, and that Duck river runs between the termination of said road and Columbia.

Upon this state of facts, the question is, had the company a right to erect the gate and exact toll at the time the defendant passed through said gate? Many questions have been discussed with great earnestness and ingenuity, which we think the court is not called upon to decide, in order to the determination of this controversy.

Whether five gates are allowed, by a just construction of these several acts, upon this road, we need not decide, for if all the other gates have been improperly erected, it will avail the defendant nothing, provided the one nearest Columbia is properly there, so as to authorise a demand of toll. Nor do we think any informality, or deviation from the "nearest and best route," in laying out the ground upon which the road was constructed, is a question which the defendant can raise against this suit. The provision, that the shortest and best route should be designated by the commissioners, was directory to them, but was not intended to invalidate any designation they might make, that should fail to attain these ends. It is true, if any very considerable deviation from this direction, had been attempted, so as to place the road upon the lands of persons, upon whose lands the shortest and best route would not have placed it, such persons, if they had felt aggrieved, might have restrained the company, by the aid of the injunction powers of a

[Franklin and Columbia Turnpike Co. vs. Campbell.]

court of chancery, from proceeding in such unauthorised construction of the road. To justify such proceeding as this, the deviation must have been flagrant and manifest. But this is a question that cannot concern the traveller on the road, after it shall have been constructed. To permit such an investigation, would necessarily involve an inquiry into every requisition of the charter, in relation to the manner in which the road should be constructed, and would create interminable investigations in relation to distance, goodness of route, &c. It must be perceived at once, that such investigations, in every suit for twenty-five cents of toll, would be most absurd.

The only question involved in the present case is, as to the right of the company to erect the gate through which the defendant passed. And in the solution of this question, the first inquiry is as to the *termini* of the road?

By the company it is contended, that the charter of incorporation does not designate any *termini*; that the company was left at liberty to make a *terminus* at any point they chose between Franklin and Columbia.

The act of 1831, and that of 1835, are alike entitled, "An act to incorporate the Franklin and Columbia Turnpike Company," and the proviso of the fourth section of the act of 1835, makes it the duty of the commissioners to run the road, "along the shortest and best route, between the towns of Franklin and Columbia." The meaning evidently is, that the road is to be constructed the *whole distance*, between the two towns. Why is seven years given the company to finish the work, if there is no particular work designated?

It must be plain, that if the company can make a *terminus* one hundred and fifty yards before they reach Columbia, they could, with equal legal propriety, stop ten miles short of Columbia. If, therefore, they may stop where they please, they might choose to say at the expiration of seven years, that they had finished their work, though no more than twelve miles of the distance had been constructed. Nor is it to be supposed, that the legislature, when this company was incorporated for the public benefit, and the rates of toll were designated, could have intended to leave it to the discretion of the company, what part of the route between Franklin and Columbia they would select and construct their road upon. The rates of toll were fixed in reference to the cost of the work.

[Franklin and Columbia Turnpike Co. vs. Campbell.]

The object of permitting the collection of such large toll at the distance of every five miles, was, that the company might be remunerated for their outlay, by the receipts of these gates.

In order that the toll should be adjusted equitably, as regards the road company and the travelling public, the legislature must have taken into consideration, the labor and expense of construction, along the whole route, the excavation of hills, the expense of bridges, &c. If the company were permitted to take any given distance between the two towns, where there were no streams to bridge, no hills to level, and plenty of material for covering the road convenient, they might construct the road for less than half the estimated cost per mile, of the whole road, and thus receive double the toll to which they would be justly entitled. Besides, of what advantage would such a road be to the public, constructed over the best ground, when the natural road would have answered very well, and leaving unimproved that part of the route, in reference to which, the legislature might have been induced to pass the law? It must be borne in mind, that these corporations are created for the public benefit, and the profit they are permitted to make, is only intended to induce them to labor for the public good, and to remunerate them for such labor. It cannot, therefore, be presumed, the legislature intended to leave a discretion to this company, by which they would be enriched by exactions from the public, without conferring upon the public a corresponding benefit.

These suggestions are made to show how absurd it would be to permit the commissioners to select any point they might choose for the *terminus* of the road. For it must be seen, that the same argument that would justify them in making the *terminus* at the Columbia bridge, would have justified them equally in making it five or ten miles from Columbia. The authority to erect five gates on this road, conferred by the fifth section of the act of 1835, the whole distance of which, is proved to be only twenty-three miles, when by the seventh section of the act of 1829, said gates are required to be at the distance of five miles from each other, is conclusive, that the legislature contemplated the construction of a road, the whole distance between Franklin and Columbia.

So the provision in the 7th section of the act of 1829, that "when the road shall be finished and completed for the distance of at least seven miles *from* the town of Nashville [Columbia] or Franklin, the Governor" is to authorise the erection of two gates, is conclu-

[Franklin and Columbia Turnpike Co. vs. Campbell.]

sive, that these towns were regarded as the *termini* of the road. But we think the language, itself, of the proviso of the 4th section, "the shortest and best route between the towns of Franklin and Columbia," designates, by its own proper force, these two towns as the *termini* of the road, so that this road must be constructed to the town line of Columbia, not to the court-house. This being established, the next inquiry is, what effect the Governor's certificate is to have in this case?

The judge below, told the jury, that it was *prima facie* evidence of the facts stated in it; but he refused to tell the jury, that the said certificate was conclusive evidence of the right of the plaintiffs to erect the gate and demand toll.

In this, we think the court was correct. The certificate of the Governor is certainly not evidence of the existence of facts which it does not state, and which in fact, it expressly excludes.

It states that the road was finished from the Columbia *bridge*, for twelve miles, and that gates might be erected as prescribed by the charter. Let that fact be established, and then the inquiry recurs, will the existence of that fact authorise the erection of this gate?

The charter says, that "a gate may be erected in two miles of Columbia, when the road shall be finished for the distance of seven miles from that place." But it is most clear, that unless the road be finished for that distance *from* Columbia, the gate in question, could not be legally erected. What the charter does not authorise, cannot be done, so as to confer a privilege. As the Governor's certificate does not say, that the road is finished for seven miles, and the evidence is most clear that it is not finished for that distance, surely it must be manifest, that a privilege granted on condition that it should be so finished, cannot attach to the company.

But it is said, the road terminates at the bridge; that said bridge belongs to the county of Maury; that the company have no right to this bridge, or to tear it down; and, therefore, to require them to finish the road, is requiring what they cannot do.

In the first place, if they have chosen to place themselves in a position in which they cannot, according to the charter, erect the gate in question, it is their own folly. But in the next place, they might, and yet may, so construct their road, as to cross the river, either above or below this old county bridge.

The act of 1823, creates no right in the county court of Maury,

[Baldwin vs. Baldwin, et als.]

in relation to the bridge, that might not be abridged, or taken away altogether by a subsequent act; and the erection of a bridge contiguous to the old one, by the turnpike company, will not interfere with any right of the county court of Maury.

We are, therefore, of opinion, there is no error in the judgment of the circuit court, and order that it be affirmed.

BALDWIN vs. BALDWIN, *et als.*

1. Mary, in contemplation of marriage, conveyed her estate, real and personal, in trust for her benefit: Held, that such deed was not embraced within the act of 1785, ch. 12, and was not required to be registered by said act to secure such estate against the creditors of the husband, whether their debts were created prior to the marriage or subsequent thereto. That act applies to the creditors of the grantor only.

2. The act of 1831, ch. 90, applies to deeds made after the passage thereof, and has no retrospective operation.

3. Where a husband, with the consent of his wife, took possession of money, which, belonging to the wife before marriage, had been conveyed to a trustee for her benefit, which deed had never been registered, and such husband, with her consent, converted the money into property, and took titles thereto in his own name: Held, that the wife had no equitable claim upon such property, against the creditors of the husband.

This bill was filed in the chancery court at Franklin, on the 21st day of February, 1840, by M. F. Baldwin, by her next friend, Dickerson, against her husband H. Baldwin, Harrison, sheriff of Williamson county, and against Campbell, Parks, and others, who had recovered judgments at law, against H. Baldwin. It was brought for the purpose of setting up a marriage contract, by which certain real and personal estate, belonging to the wife before marriage, had been conveyed, in contemplation of marriage, to a trustee for her benefit, which deed had never been registered, and for the purpose of asserting her right to the property therein conveyed against the debts of her husband, contracted after the marriage.

It came on to be heard on the bill, answers, replication, exhibits and proof, at the October term, 1840, before Chancellor Bramlett, who being of the opinion, that the deed of marriage contract was not required to be registered, perpetuated the injunction,

[Baldwin vs. Baldwin, et als.]

which had been previously granted, as to the slaves embraced in the deed, &c. Defendants appealed.

The facts of this case are sufficiently set forth in the opinion of the court.

Meigs, for complainant.

1. It is said, the marital right did attach, because the deed was not registered. See *McNairy vs. Vance*, 3 Yerg. 171: *Turner vs. Shields*, 10 Yerg. 1: *Montgomery vs. Hobson*, Meigs, 454: *Morris vs. Ford*, 2 Dev. Eq. Rep. 412: *Jackson vs. Burgott*, 10 Johnson, 461.

2. And that if the marital right did not attach, the property is nevertheless liable to the creditors of the husband, because the unregistered deed is a fraud on them. As to which, see act 1785, ch. 12, sec. 1: 1 Scott, 337-8, sec. 7: 1805, ch. 16, sec. 2: *Id.* 857: *Pierce vs. Turner*, 5 Cranch, 154, in 2 Cond. R. 219: *Morgan vs. Elam*, 4 Yerg. 375: *Hamilton vs. Bishop*, 8 Yerg. 33: *Sand vs. Jeffries*, 5 Rand. 211 and 599: *Maguire vs. Thompson*, 7 Peters, 348, 389 to 398.

The position assumed by the courts, who decided the cases last cited, that laws pronouncing marriage settlements void as to creditors for want of registration, mean only the creditors of the settlors, is confirmed by the words of the preamble of the act of 1785, ch. 12, which show that that act was aimed at settlements and marriage contracts "*binding the estates of the husband.*" A settlement made by a *feme sole* of her own property previous to marriage, can, in no sense, be said to bind the estate of her after taken husband; since, at the time of the settlement, she not only had no husband in fact, but may not have had one so much, even, as in contemplation.

The marriage settlement acts, as well as all registration laws, as to this point, are in *pari materia* with all the laws against fraudulent conveyances, and these latter have always been construed to avoid conveyances only as to the creditors of the makers. As to which, if so plain a point needs the support of authority, see 7 Yerg. 159: 7 Peters, 389 to 398: 2 Lomax's Dig. 367, sec. 10, vii.

F. B. Fogg, for the defendants. The act of 1785, ch. 12, upon marriage settlements and other marriage contracts, has never re-

[*Baldwin vs. Baldwin, et als.*]

ceived any construction by the courts of Tennessee. The only cases to be found in North Carolina, are the following:

1. *Freeman vs. Hill*, 1st Devereaux & Battle's Equity cases, p. 389. In that case, Judge Gaston says, "From the preamble of the acts, and from the language of its several enactments, it is obvious, that it is the creditors of the husband whom it designs to protect against deception and injury."

2. *Saunders vs. Ferrill*, Iredell's Rep. vol. 1, p. 104. In which the court says, "This language shows clearly, an intention of the legislature, that as to *his* (the husband's) creditors, the vesting of the property of the wife in the husband *jure mariti* should not be prevented by *any secret* agreement, whether written or verbal. The secrecy of the agreement is the evil on which the preamble dwells, as tending to deceive creditors. The act designs to take from the parties all opportunity of practising such deception, and thus to prevent injury to creditors by giving to all such arrangements that degree of publicity which can be derived from registration." In page 105, "The act makes a registered, and of course a written instrument, the *only* evidence against the husband's creditors that *any* estate has been secured to the wife." In other words, the possession by the husband of personal property, which belonged to the wife before marriage, is conclusive evidence for his creditors, that the property belongs to the husband, unless it is shown that the settlement upon her, or a trustee for her use, is proved within six months after the making thereof, and registered within one month thereafter.

The same construction is given to an analogous statute in South Carolina. 4th Desaussure, p. 227, *Taylor vs. Heriot*.

The title of personal property was not required to be evidenced by registration by the act of 1715, except as to mortgages. The first registered mortgage had the preference, unless the prior mortgage was registered in fifty days after date.

Then comes the act of 1784, ch. 10, as to bills of sale of negroes and deeds of gift of any estate. 1789, ch. 59. If not proved and recorded, they were to be void and of no force whatever. Where donee or vendee took possession, courts in N. Carolina, hold registration was not necessary.

The ordinary registration laws make unregistered deeds void as to creditors of grantor. In examining the register's books, the grantor is found to be the owner; a creditor need look no further.

[Baldwin vs. Baldwin, et als.]

The act of 1785, is not *ad idem*. The husband is seen by creditors in possession of personal property *jure mariti*. If the wife's title is not shown by the register's books to be vested for her separate use, the presumption is conclusive, that he is the owner. The possession is evidence of title.

GREEN, J. delivered the opinion of the court.

In the fall of 1830, the complainant, then Mary Florida Dixon, a *feme sole*, and the owner of an estate consisting of fifteen or twenty thousand dollars in cash, in the hands of her guardian, and thirty or forty negro slaves, contemplating a marriage with the defendant, Henry Baldwin, executed a deed, dated 27th October, 1830, (in which the said Baldwin also joined,) conveying all her property to James W. Hoggatt, in trust for her separate use and benefit.

By the said deed, the said slaves, &c., were to be held for the sole use and benefit of the said Mary F. until the solemnization of the marriage, and after the marriage she was to have said property, for her separate use, free from the control of her husband, and as a *feme sole*. She also reserved to herself the power to direct in what manner the slaves should be employed; how the money should be invested; and by her directions in writing, under her hand, in the presence of one or more witnesses, to alienate, sell, dispose of, or invest the said slaves, &c., in any way or manner she might think proper; also to appoint any other agent or trustee for the management of said property, and to bequeath or devise the same by her last will and testament.

The marriage was solemnized in November, 1830, and in December thereafter, she made a power of attorney to her husband, authorising him to take possession of all her property, to receive and appropriate the income for their joint use, without being accountable to her for the same; and if deemed necessary by both, to sell any part of the property, or to invest the principal money in any other real or personal estate, he might thereafter be authorized to do upon the further consent in writing to such sale or investment, signed in the presence of one or more witnesses. By another instrument of the same date, she agreed and directed, that in payment of \$9,000, due by her guardian, a deed of conveyance should be made to her husband and herself, and their heirs, of a tract of land, in Davidson county, called "Hunter's Hill," from Col.

[Baldwin vs. Baldwin, et als.]

Ward, her said guardian. A deed for said land was accordingly executed by Col. Ward to Mr. and Mrs. Baldwin, and their heirs, dated 24th December, 1830. Afterwards the said Hunter's Hill farm was sold to H. R. W. Hill for \$10,000, Mr. and Mrs. Baldwin joining in the deed to him. This sum of ten thousand dollars was applied in part payment of the Franklin cotton factory, store, &c., which were sold to Baldwin by Parks, Campbell, & Co., for \$18,000. This property was conveyed to Henry Baldwin alone, the 24th October, 1833, about which time he removed to Franklin, where he embarked in the business of cotton spinning and weaving. He became embarrassed in his business, and various judgments were recovered against him, and executions were levied on the above-mentioned property, and on the negroes aforesaid. To prevent the sale of this property, Mrs. Baldwin filed this bill against her husband and his said creditors.

The deed of the 27th of October, 1830, had not been registered until since this bill was filed. And the question is, whether it is void by our statutes, as against the creditors of Henry Baldwin?

To show that this unregistered deed is not void as to the creditors of the husband, the complainant's counsel has cited and relied on the cases of *Pierce vs. Turner*, 5 Cranch, 154: *Sand vs. Jeffries*, 5 Rand. 211 and 219, and *Morgan vs. Elam*, 4 Yerg. 375.

The defendants' counsel attack these cases as having been erroneously decided, and also insist, admitting their authority, they are distinguishable from this case, and, therefore, ought not to govern in its decision; that this case depends upon a proper construction of the act of 1785, ch. 12, sec. 1, and that the supreme court of N. Carolina, in the case of *Freeman vs. Hill*, 1 Dev. & Bat. Eq. Rep. 389, and the case, *Saunders vs. Ferrill*, 1 Battle's Rep. 104, has construed that act correctly.

In the report of the case of *Morgan vs. Elam*, it is perceived that a majority of the court, dissatisfied with the construction which was given to the Virginia statute in the case of *Pierce vs. Turner*, continued the cause one term for consideration on advisement. At the next term, the case of *Sand vs. Jeffries*, decided by the court of appeals of Virginia was produced, and one of the judges yielded to the authority of these two cases, not because he was convinced of their correctness, but because he felt he ought to distrust his own judgment, when opposed to the opinions of the supreme court of the U. States, and of the court of appeals of Virginia.

[Baldwin vs. Baldwin, et al.]

The case of *Morgan vs. Elam* was decided in 1833, and was understood to settle the law upon this subject, and it has remained unquestioned ever since, until it was brought under review, in the case now before the court. The conduct of parties has, doubtless, been regulated by that decision, and an omission to register deeds of this description, may have happened, because it was believed to be unnecessary to do so. But it is said, that the cases before referred to, are distinguishable from the one now under consideration, in their facts, and in the principles applicable to them. Let us briefly examine and see what discrepancy exists, and whether they are to be regarded as authority in this case.

In the case of *Pierce vs. Turner*, (5 Cranch, 154,) it was contended by the creditors of Turner, the husband, that the unregistered deed of the wife, by which she had conveyed her own property, to a trustee for her own use, before the marriage, was void by the laws of Virginia, as to all *creditors*, who, *but for the unregistered deed*, would have been entitled to have satisfaction of their debts out of the property thereby conveyed. In that case, Rebecca Renner, being a *feme sole* and seized and possessed in her own right of certain land and slaves, conveyed the same by deed, in consideration of an intended marriage between herself and Charles Turner, to trustees, to be held in trust for the use of herself, until the marriage should be solemnized, and afterwards to the use of herself and Charles Turner, and the longest liver of them, and after their death to the use of her heirs. Charles Turner was named as the second party to the deed, and joined in the execution thereof. It was dated in February, 1798, and was not recorded until September, 1807.

Turner became indebted and died insolvent, and Rebecca Turner, his widow, still remained in possession of the slaves, and Pierce brought an action of debt against her, in the circuit court of the District of Columbia, sitting at Alexandria, charging her as executrix, in her own wrong, of her late husband, Charles Turner, deceased.

The question was, whether the deed of trust was void, as to the *creditors of the husband*, so as to charge the widow as executrix in her own wrong. The 4th section of the "act regulating conveyances" in Virginia, provides, "That all conveyances of lands," and "all deeds of settlement upon marriage, wherein either lands, slaves, money or other personal thing shall be settled," and

[Baldwin vs. Baldwin, et als.]

“all deeds of trust and mortgages whatever,” shall be void as to all creditors and subsequent purchasers, unless they shall be acknowledged and proved, and recorded according to the directions of this act, but the same, as between the parties and their heirs, shall nevertheless be valid and binding.

The court decided, that this unregistered deed protected the property of the wife from the creditors of the husband, because the act making unrecorded deeds void as to creditors and subsequent purchasers, meant creditors of, and subsequent purchasers from *the grantor*. This case in its facts and circumstances, and in all the principles involved in its decision, cannot be distinguished from the one now before the court, unless the provisions of our act of 1785, ch. 12, sec. 1, shall be found to contain provisions, differing so essentially from the Virginia law, as to demand a different decision.

In the case of *Sand vs. Jeffries*, (5 Rand. 211,) an absolute deed was made by Mrs. Birdsong, (before her marriage, and with his assent,) to her brother J. H. Sand, conveying her slaves and furniture to him. There was no delivery of the property to Sand, and the deed was in fact made for the purpose of securing the property of Mrs. Birdsong from the claims of the creditors of Jeffries, who was greatly in debt. The marriage took place, and the slaves continued in the possession of Jeffries. The deed was not recorded in the time required by the law of Virginia, and *Stewart*, a creditor of *Jeffries*, caused an execution to be levied on some of the slaves. *Sand*, as the next friend of *Mrs. Jeffries*, filed a bill against *Jeffries* and the other creditors, to enjoin the sale. Although the facts in this case, are slightly variant from those in *Pierce and Turner*, still the question to be decided, was substantially the same, to wit, whether the unrecorded deed of the wife, made before marriage, was void as to those creditors, *who but for the deed*, would have been entitled to have satisfaction of their debts, out of the property thereby conveyed. In this case, the court of appeals of Virginia, reviewed the decision of the supreme court of the United States, in the case of *Pierce vs. Turner*, approved its principles, and again declare that the law making unrecorded deeds, void as to creditors, means the creditors of the *grantor* only; and that this general principle applies equally to the deed of a *feme sole*, executed before marriage, by which she conveys her property for her separate use, so that the marital right of the husband, does not attach, and his

[Baldwin vs. Baldwin, et als.]

creditors have no right to challenge the deed, because it has not been recorded. In the case of *Morgan vs. Elam*, (4 Yerg. 375,) decided by this court in 1833, it appeared that Elizabeth Stokes, residing in the State of Virginia, was the owner of a considerable estate, consisting of land, slaves and bank stock; that being about to marry Samuel Elam, she conveyed all her property to *W. B. Hamblin*, in trust for her separate use during the coverture, and at her death, to whomsoever, she, by will, should appoint to receive the same; *Samuel Elam*, joined in the deed, and the marriage took place. Elam was greatly involved in debt, and mortgaged the negroes to Morgan, one of his creditors, to secure the payment of his debt. The parties with the negroes removed to this State, and Morgan filed a bill to foreclose his mortgage, and subject the negroes to the payment of his debt. The deed from *Mrs. Elam* to *Hamblin*, had never been recorded in Virginia, or in this State. And the question in this part of that case was, whether this deed was void as to the creditors of the *husband*, who, *but for this unregistered deed*, would have been entitled to satisfaction out of the property so conveyed. This court following the cases of *Pierce vs. Turner*, and *Sand vs. Jeffries*, decided that the deed was not void as to the creditors of the husband.

The counsel for *Morgan*, made a most vigorous attack upon the case of *Pierce vs. Turner*, and in an able argument, animadverted upon the reasoning of the court in that case. But at the next term, the case of *Sand vs. Jeffries* was produced, and this court determined, that an anti-nuptial conveyance, made by a wife of her own property for her own separate use, was good as against the creditors of her husband, though not registered. The case now before the court, does not differ from the case of *Morgan vs. Elam*, in any essential particular. It is true in *that* case, the creditor was such *before the marriage* of Elam, and in this case, the creditors became such *after the marriage* of Baldwin. But we have seen that the principle involved, was the same in all the cases, to wit, whether the unregistered deed is void as to *all creditors*, who, *but for the deed*, would be entitled to satisfaction out of the property conveyed? But it is said, admitting the construction of the Virginia act to be correct, still the defendants are entitled to have this deed set aside upon a proper construction of our act of 1785, ch. 12, sec. 1. Let us compare that act with the Virginia law. We have seen that the Virginia law declares, that "all deeds of settle-

[Baldwin vs. Baldwin, et als.]

ment upon marriage, wherein either money, slaves, land or other personal thing shall be settled, shall be void as to *all* creditors and subsequent purchasers, unless they shall be acknowledged, or proved and recorded, according to the directions of this act." Our act provides, that "all marriage settlements, and other marriage contracts, hereafter to be made, shall be proved within six months after the making thereof, and registered within one month thereafter; and all marriage settlements, and other marriage contracts, not proved and registered, according to the directions of this act, shall be void as to creditors."

This juxta-position of the two laws, enables us to perceive at once, that the Virginia law employs words of more extensive signification and general import, than our own. It says, "*all deeds* of settlements upon marriage, shall be void as to *all* creditors, unless proved and recorded." Our act says, "all marriage settlements, and other marriage contracts, not proved and registered, shall be void against creditors." In the former, the words, "all deeds of settlement upon marriage," have as extensive signification as in the latter, "all marriage settlements, and other marriage contracts," can possibly have; therefore, there can be no instrument of writing creating a marriage settlement, embraced in the act of 1785, which is not also embraced in the Virginia law. And when you come to the words of the two acts, by which these instruments are made void if not recorded, the words of the Virginia law are much broader than the language of our act. The Virginia law says, "they shall be void as to *all* creditors and subsequent purchasers." Our act only says, "they shall be void against creditors." The words, "all creditors," thus used, are very significant, and very unusual in such laws. They would seem to indicate, that the legislature of Virginia, intended to include, by the use of the word "*all*," other creditors, than those in favor of whom, such laws usually declared deeds void. But our act indicates no such thing; the legislature contenting itself with the use of the simple word, "creditors." It is difficult to perceive, after this comparison, how it could be thought, that a class of creditors, not embraced in the Virginia law, are provided for in our act of 1785. But it is said, that the preamble of the act of 1785, unlocks the meaning of the legislature, and extends the enacting clause, so as to include the case now under consideration.

The preamble is as follows: "Whereas marriage settlements

[Baldwin vs. Baldwin, et als.]

and other marriage contracts, binding the estates of the husbands, have been frequently made and kept secret, whereby the possessors upon the credit of their apparent property have been enabled to contract great debts, to the manifest deception and injury of their creditors, for remedy whereof," &c. Here the mischief complained of, is, that "contracts binding the estates of husbands," had been kept secret, whereby, upon the apparent ownership of the property the possessor had contracted debts. But in what sense can an anti-nuptial deed, executed by the wife to a trustee, by which she conveys her own property for her separate use, be regarded as a contract "binding the estate of the husband?" It is admitted such a deed is valid (if made with the knowledge and consent of the husband) as between the parties.

It prevents the marital right from attaching, and consequently the husband acquires no estate in the wife's property. The legislature, therefore, in providing against the effect of unregistered marriage settlements, binding the estate of the husband, did not have in view the case of the wife's anti-nuptial deed of trust of her own property for her separate use. The preamble, so far from indicating such intention, indicates as we have seen a purpose only to provide against such unregistered deeds, as "bind the estate of the husband," that is, such marriage settlements made by the husband, by which his property, (that he owned before the marriage, or such property of the wife's as should vest in him by virtue of the marriage,) should in consideration of marriage, be limited by deed to the wife, and such other persons as the party might choose to select.

In such case, the husband would be the grantor, and the act, in making such deed void as to creditors, for want of registration, only adopts the general principle heretofore referred to. The second section makes this still more plain. It provides that marriage settlements shall not be good against creditors, when a greater value is secured to the intended wife and children of the marriage, than the portion actually received with the wife in marriage, and such estate as the husband may be possessed of at the time of marriage, deducting his debts then due.

This provision manifestly has reference to a conveyance of the husband only. What amount by this act, may be settled upon the wife and children of the marriage? The answer is, the fortune the husband receives with the wife, and so much of his own estate as may be over and above his debts.

[Baldwin vs. Baldwin, et al.]

But the preamble, the enacting clause of the first section, and the second section, all speak of the same description of marriage settlements or contracts; therefore, all have reference to deeds executed by the husband only.

But it is said, that this act, has received a different construction by the supreme court of North Carolina, in the case of *Saunders vs. Ferrell*, (1 Battle's Rep. 104.) In that case the construction of the act of 1785, was not involved so as to require the judgment of the court. Hector C. Homer and Eliza Savills, before their inter-marriage entered into written articles, by which it was agreed that all her estate should be settled for her sole and separate use during her life, with remainder to her intended husband.

After the parties were married, they united in a deed of settlement by which all the property of Mrs. Homer was conveyed to E. Saunders in trust for the sole and separate use of the said Eliza, and at her sole disposal. The husband contracted debts, and executions were delivered to Ferrill, sheriff of Camden county, who seized some of the negroes. Saunders, the trustee, brought an action of detinue for the slaves.

It was contended for the defendant, that the deed of settlement was void as to creditors, because by it the whole property is secured to the wife to be at her disposal, and by the articles executed before the marriage, she was only to have a life estate and the remainder to her husband. The court decided that on account of the excess of interest in the property settled on Mrs. Homer, over and above the stipulations of the anti-nuptial contract, the deed was void as to the whole. This was clearly correct, and decisive of the case, but the court go on to remark upon the act of 1785, in reference to the articles which had not been registered in the time prescribed, and after referring to that part of the preamble which suggests, that "marriage settlements have been frequently made, and kept secret, whereby the possessors upon their apparent property, have been enabled to contract great debts," they came to the conclusion that "it was the intention of the legislature, that as to his creditors the vesting of the property of the wife in the husband '*jure mariti*' should not be prevented by secret agreement, whether written or verbal." It is to be remarked that in reciting the preamble, the court leave out entirely the words, "binding the estate of the husband," by which means, they give it a meaning entirely different from that which its words taken together, as they

[Baldwin vs. Baldwin, et als.]

are found in the statute, seem to us to indicate. We think, therefore, that the case is very much weakened as an authority; and ought not to control the decision of this cause now before the court.

The facts are very different; there the husband executed the articles and covenanted to make a settlement on the wife. The property vested in him by the marriage and became his estate, leaving the wife only an equitable right to have a settlement decreed by a court of chancery.

But the case is very different where the wife conveys her own property, before marriage, so that it does not vest in the husband by the marriage, or in any wise become his estate. Upon the most mature consideration of the cases reviewed in this opinion, we are satisfied that we ought not to depart from the principles decided in the case of *Morgan vs. Elam*. The facts of that case were substantially the same with this cause. The requirements of the Virginia law, upon the construction of which that case were decided, were couched in terms more comprehensive than our act of 1785. The decision, therefore, was a judicial declaration to women, situated as this lady was, that in order to protect their property from the creditors of their husbands, their anti-nuptial deeds of trust, need not be registered.

The case of *Bishop vs. Hamilton*, (8 Yerg. 33,) decided in 1835, indicated an adherence on the part of the court, to the case, *Morgan vs. Elam*. A decision of this court, defining and settling a rule of property, followed by a subsequent decision, and acquiesced in so long, ought not to be overruled, although the court might think it had erred in the first instance. It is suggested in argument, that the act of 1831, ch. 90, applies to this case. It is not necessary to discuss the question as to the power of the legislature, by the introduction of a new rule of property to take away rights that had vested under the old rule.

It is sufficient, if it shall appear, that the legislature did not intend, that the act of 1831 should operate upon deeds that had been executed before its passage, and had vested a valid title to the property conveyed. The whole scope of the language used in the first section, is prospective, and the fifth section puts the question beyond doubt. It says, "marriage contracts or agreements, in which the wife's property before marriage is settled on her, or on a trustee for her use," "shall be registered in the county where the

[Baldwin vs. Baldwin, et als.]

husband resides at the time of the marriage; and should the husband move to any other county or counties in the State, it shall be registered in said county."

Here, evidently, the act refers to marriages to take place after its passage. The deed is to be registered in the county where the husband resides at the time of the marriage. This is sensible, just and proper, if it refer to marriages to take place after the passage of the law. But to suppose it to refer to marriages that had theretofore taken place, would be to make the legislature require a very absurd thing. Suppose a marriage had taken place years before the passage of the law, and the parties had removed to a distant county, can any one suppose the legislature intended to compel the party to go back where her husband had lived at the time of the marriage, and register her deed? Surely not. But such is the requirement, if the act refer at all to deeds before its passage. But its language is in the present tense only. It says, the deed "shall be registered in the county where the husband *resides*," not where he *resided*, when the deed was made, but where he *resides* when the transaction shall take place. As to the provision about registration in the county to which the husband shall remove, it is sufficient to remark, that it has reference to the same deeds, that by the preceding clause of the sentence were to be registered in the county where the husband resides at the time of the marriage. This is rendered too plain for argument by the provision that immediately follows: that "if the original be lost, a copy from the register's book of the county, where first registered, shall be registered." The twelfth section provides, that all marriage contracts not proved and registered, as required by the preceding sections of the act, shall be "null and void," as to existing or subsequent "creditors of the husband." Will it be supposed, that the legislature intended, that a deed which, before the passage of the act, was valid and vested the property in the grantee, should thus be declared void, as against *existing* creditors? If so, it would be void the very first hour of the day upon which the act went into operation, provided that there existed at that time creditors of the husband. Furthermore, if it has a retrospective meaning, all deeds registered and unregistered are declared void, if they had not been registered according to the provisions of this act, although proved and registered as the law at the time they were executed, directed.

[Baldwin vs. Baldwin, et als.]

But no one will accuse the legislature of such an absurd purpose, and, therefore, it is clear, that the whole act has a prospective meaning and operation only. But it is said, the case of *Hays vs. McGuire*, (8 Yerg. 92,) recognizes the operation of the act of 1831 upon deeds executed before its passage. It is only necessary to say, in reference to that case, that it was a question between the *parties to the deed*. The court decided only, that the act of 1831, declared the unregistered deed void as to the existing and subsequent creditors and purchasers without notice, and that as between the parties it did not alter the law. No question, as to its operation upon previously existing deeds as to creditors, was before the court.

We think, therefore, that the act of 1831, has no application to this case; and that the deed of the 27th of October, 1830, is valid as against the creditors of Henry Baldwin, although it was not proved and registered according to the provisions of the several acts of assembly requiring the registration of deeds.

The cash in the hands of her guardian at the time of the marriage, has been so used and vested in property in his own name, by Henry Baldwin, with the knowledge and consent of the complainant, that it is conceded by her counsel, that she has no equity against the creditors of her husband.

But as to the negro slaves that remain in her possession, the court is of opinion she is entitled to a decree for a perpetual injunction.

Let the decree be affirmed.

NOTE.—The case of *Saunders vs. Ferrill*, referred to in the above case, will be found in Iredell's Law Reports, vol. 1, p. 97, reported by Battle.

GRIGSBY vs. MOFFAT, et als.

The circuit judge charged the jury that if the defendant threatened to whip the plaintiff out of the country, and plaintiff was afterwards whipped, it would in the absence of exculpatory evidence be a strong presumption against him; but if he had only expressed the opinion that he ought to be whipped out of the country, it would not be so strong a circumstance: Held, that there was no error in this charge.

On the 8th day of February, 1838, John Grigsby instituted an action of trespass *vi et armis*, against W. Moffat, J. Moffat and J. Taylor, in the circuit court of Lincoln county. The damages were laid at \$10,000.

The plaintiff set forth as his cause of action that the defendants seized him in bed in the county of Lincoln, on the 6th day of February, 1840, took him by force to the forest, stripped him naked, and scourged him severely with rods.

The defendants pleaded not guilty to the charge, and issue was joined thereupon. The defendants, upon affidavit of themselves and three others, satisfactory to the court, moved the court for a change of venue, on the ground that they could not get justice in the county of Lincoln. The order was accordingly made and the cause transferred to the county of Bedford, as the nearest adjoining county free from the like exception.

The cause, was, after repeated continuances, submitted to a jury of Bedford county at the August term, 1840, S. Anderson, judge, presiding. It appeared that Grigsby was a resident in East Tennessee, and that he appeared in Lincoln county as a witness in a case between Moffat and one May; that on the evening of the 6th of February, 1840, he went to the house of Judith Ellis in the vicinity of Fayetteville, the county seat of Lincoln; that on the night of the 6th, between the hours of ten and eleven o'clock, three men entered the house of said Judith, seized Grigsby and took him into an adjoining forest; that in the night Grigsby returned, stating that he had been severely scourged. He was bloody, and his back was much cut and lacerated, apparently with rods. There were some two or three persons in the house of Judith Ellis, but the night was dark, there was no light in the house, and they testified that they could not, therefore, state with any degree of certainty who the persons were who entered the house.

One witness testified that she saw two of the defendants going on the evening of the 6th of February towards the house of Ju-

[Grigsby vs. Moffat, et als.]

dith Ellis. Smith testified, that on the day before the plaintiff was whipped, he was with the defendant, William Moffat, on the pavement in Fayetteville, and Moffat pointed out May and said, "there comes May with his witness; how would you like such a man as that to swear against you? He is a d——d horse-thief, and belongs to a club of horse-thieves in the Cherokee nation. Such a man as that ought to be hickoried out of the country."

The defence of the defendants rested on proof going to show an *alibi*. There was submitted to the jury a mass of circumstantial proof on both sides, which it is not necessary here to set forth.

Under the charge of the judge, which is set forth in the opinion of the supreme court, the jury rendered a verdict in favor of the plaintiff for the sum of \$2000 damages. The defendants moved the court for a new trial. This motion was overruled, and judgment rendered upon the verdict. The defendants appealed in error.

James Campbell, for plaintiffs in error.

Taul, for defendant in error.

GREEN, J. delivered the opinion of the court.

This is an action for assault and battery against the plaintiffs in error, for whipping the defendant in error, and detaining him in custody. The part of the charge of the court to the jury which it is insisted is erroneous, is as follows, namely:

"If the jury believed from the proof, that William Moffat, the evening before the injury was inflicted upon the plaintiff, threatened he would whip him out of the country, and the act he threatened was afterwards perpetrated, this, in the absence of proof exculpating him, would raise a strong presumption that he had done the act; but if the language used by Moffat the evening before the injury was inflicted, was substantially, that John Grigsby was a witness against him, that he was a d——d horse thief, and that he ought to be whipped out of the country, then the jury were to judge the import of such a declaration, and the intent which dictated it. If they considered the expression, under the circumstances, and the manner in which it was made, was a mere expression of an opinion, it would not be so strong a circumstance against him, but if as rational men, they would understand the expression, consid-

[Grigsby vs. Moffat, et als.]

ering the time, the allusion, and the circumstances under which it was made, as indicating a determination on his part to inflict the chastisement, it would be equivalent to an express threat, and afford a strong presumption of guilt, unless explained or rebutted by proof inconsistent with the presumption. Men have been convicted of criminal offences upon proof they had threatped to do an act, which was afterwards committed. But such proof would only furnish a presumption against the defendant using the expression."

The meaning of this charge may be more briefly expressed in the following language: "If the defendant threatened to whip the plaintiff out of the country, and he was afterwards whipped, it would, in the absence of exculpatory testimony, be a strong presumption against him, but if he had only expressed the opinion that he ought to be whipped, it would not be so strong a circumstance. Men have been convicted upon proof of threats, but such proof would only furnish a presumption against the party making them." Here it will be seen at once, that the judge does not mean that threats furnish an artificial legal presumption of guilt, but a *natural presumption of mere fact*, calculated to generate conviction in the mind, as derived from those connections, which are pointed out by experience. In this cause it is only circumstantial evidence. 3 Starkie, 1245, 1247. In this sense, Lord Coke's violent presumption is used. Starkie (1246) says, that the case he puts "where a man is found suddenly dead in a room, and another is found running out of that room with a bloody sword in his hand," is only a case of circumstantial evidence.

That the court, in this case, uses the word *presumption* as synonymous with *circumstance*, is manifest from the manner in which he employs the term. He says, if the defendant made the threat, it is a presumption of guilt, but if he only expressed an opinion, it would not be so strong a *circumstance*; that is, the expression of an opinion, that the plaintiff ought to be whipped, would not be so strong a circumstance against the defendant, as if he had threatened to inflict the whipping. We think, therefore, there is no error in the charge of the court. Let the judgment be affirmed.

GOODRUM, et als. vs. CARROLL, Gov., FOR USE OF FOLEY.

1. A bond executed by a public officer and his sureties, though not good as a statutory bond, may nevertheless be binding as a voluntary obligation, and an action at common law be maintained thereupon.

2. If a deed be delivered to a stranger for the use of the obligee, and he afterwards receive it, it is good from the time it was delivered to the stranger.

3. If a bond be accepted by the obligee at the time of the plea, it is the deed of the obligor.

4. The delivery of the bond of a sheriff, made payable to the Governor, for the performance of his official duties, to the clerk of the court, is a *delivery* to the Governor; and this is so, though such sheriff's bond be not in compliance with the statute under which it is taken.

This is an action of covenant which was instituted in the circuit court of Giles, by Carroll, governor, for the use of Foley, against Goodrum and others, who were the securities of Thomas C. Porter, former sheriff of that county. The bond on which the suit was brought, was made payable to William Carroll, governor, and his successors in office.

The directory mandates of the statute, in reference to sheriffs' bonds, not having been complied with, it was decided that no motion would lie on this bond. See *Goodwin vs. Saunders and Read*, 9th Yerger, 91. Porter had collected money by execution in favor of Foley against Field, and failed to return the execution, or pay the money, and this action was instituted against his securities. The pleadings put in issue the delivery of the bond by the defendants to Carroll and his acceptance thereof. It was tried at the July term, 1841, by Dillahunt, judge, and a jury of Giles county, and a verdict and judgment rendered for the plaintiff. The defendants appealed in error.

Meigs, for plaintiffs in error.

Goode, for defendant in error. Bonds required by statute to be taken in a particular manner, are good as common law bonds although the requisites of the statute may not be complied with. *Mallory vs. Miller*, 2 Yer. Rep. 113: *Hibbits vs. Canada*, 10 Yergrs Reports, 465: 7 Massachusetts Reports, 98: *Freeman vs. Davis, et al.* do 200: 1 Dev. Rep. 156: 4 North Carolina Rep. 268: 2 Hawks, 366, 3 do. 42: 2 do. 5. Such bond, if required by statute to be taken payable to some officer of the State,

[Goodrum, et als. vs. Carroll.]

should be sued upon in the name of the payee or obligee therein, and not his official successor. *Hibbits vs. Canada*, 10 Yer. Rep. 465. This bond has been decided by the supreme court not to be statutory. *Goodwin, et al. vs. Saunders & Read*, 9 Yer. Rep. 91.

This suit being instituted, then, upon this bond, not as a statutory, but common law instrument, all that is necessary in order to enable the plaintiff to recover, is to show that it was signed and sealed by the defendants, and delivered to the plaintiff. No question arises upon the signing and sealing, both being fully established. Does the evidence show a delivery to and acceptance by the plaintiff? Any act tantamount to a delivery will do, although the obligors may not say we "deliver the bond," such as throwing it on the table, giving it to a third person, either the agent of the obligee or a stranger, or such like. 9 Law Lib. Hurlst. on Bonds, 5: 5 Barnwell & Creswell, 692: Sheppard's Touch. 58: *Verplank vs. Story*, 12 John. Rep. 536. Or if the bond is signed and sealed, and the obligor leave it on the table behind him. 4 Cruise's Dig. 30: Cro. Eliz. 7: Shep. Touch. 55-6, n. 1 and 3: Com. Dig. (Fait, A 3.) Or any act evincing an intention to deliver, are sufficient. *Goodrich vs. Walker*, 1 J. C. 250.

A delivery to the clerk of a non-official bond is good, unless the obligee refuse. 3 North Carolina Rep. 384: 4 do. 270. This last case decides that if a bond is found among the papers in the office, the jury is authorised to infer a delivery. 1 John. 254. The production of the bond in court by the attorney of the plaintiff is *prima facie* evidence of acceptance.

GREEN, J. delivered the opinion of the court.

The bond upon which this suit was brought, was executed by the defendants to Wm. Carroll, Governor of Tennessee, and his successors in office, in the penal sum of \$10,000, conditioned that T. C. Porter, who had that day been appointed sheriff of Giles county, should faithfully execute and perform the duties of that office.

The evidence is, that this bond was written by the deputy clerk of the county court, and was signed by the defendants in the office of the clerk of that court, and left upon the table, from whence it was taken by said deputy, and filed away among the papers of that office where it had remained, except when it had been applied for and used by attorneys, in this case and in other cases against these defendants. Porter was qualified and acted as sheriff, and

[Goodrum, et als. vs. Carroll.]

as such received an execution in favor of Foley against Field, upon which he received the money, but had failed to pay it over, or return the *fi. fa.*

This was not an office bond according to the statute, because the penalty is ten thousand dollars, instead of twelve thousand dollars, as required by the statute, and because it was not approved and recorded as the statute directs. It has been decided by this court (10 Yerg. Rep. 465,) and is admitted, that a bond executed by a public officer, and securities, though good as a statutory bond, may, nevertheless, be binding as a voluntary obligation, upon which an action at common law may be maintained. 3 Dev. Rep. 384: 4 do. 270.

The only question seriously urged in this case, is as to the delivery of this bond. If a deed be delivered to a stranger for the use of the obligee, and he afterwards receive it, it is good from the time of the delivery to the stranger. Sheppard's Touchstone, 57-58: Coke, 225, note *w.* If a bond be accepted by the obligee at the time of the plea, it is the deed of the obligors. 3 Rep. 28: 5 do. 119. In this case, the bond was executed by the plaintiffs in error, under the belief and persuasion, that it was a good statutory bond, and consequently, with the intention, that it should be kept for the use of Carroll, to be sued on, as an office bond. As to the actual fact of such intention, no one can doubt. But if it turn out that they were mistaken, that it was not a valid office bond, can that legal construction of the instrument change the fact of their intention in its execution and delivery? Surely not. The facts are immutable, however parties may be mistaken as to legal consequences.

The only question then is, has Carroll received it? We think the commencement of the suit on the bond, and the production of it in court by the attornies of the plaintiff, is sufficient evidence, *prima facie*, of his acceptance; and that therefore at the time of the plea pleaded, the obligee had received the bond.

In 3 Dev. N. C. Rep. 384, it is held that a delivery of such a bond as this to the clerk is sufficient, unless the obligee refuse it. In 4 Dev. N. C. Rep. 270, the same doctrine is reiterated, and indeed all the cases in our court, necessarily affirm the same thing. For, although the point was not made directly, yet it was necessarily involved, as in no case was there proof of an actual consent to receive the bond by the obligee.

[Knott vs. Planters' Bank.]

But counsel insist, that in all these cases the bonds were delivered according to the directions of the statute. A compliance with the forms of the statute, upon this point, can make no difference, as they were not statutory bonds; the circumstances attending their execution were only evidence of the intention of the obligors in making them, and we have seen that the intention of the obligors in this case, is as clearly shown as though all the forms of the statute had been complied with. So that the evidence of reception by the obligee is as strong in this case as in any one of the cases heretofore decided upon this subject. Let the judgment be affirmed.

KNOTT vs. PLANTERS' BANK.

To permit proof to be received under the plea of non-assumpsit, that an endorsement is not genuine, is in violation of the act of 1819, ch. 42, sec. 1, unless such plea be accompanied with an affidavit of the truth thereof.

Meigs, for the plaintiff in error.

Fogg, for the Bank.

TURLEY, J. delivered the opinion of the court.

Plaintiff in error is sued as endorser of a promissory note. He pleaded non-assumpsit, which plea is not verified by oath. On the trial he introduced proof to show that the endorsement upon which he was sought to be charged, was not in his hand writing, but in that of one E. W. Dale. A verdict was found by a jury against him, and a new trial asked for, which was refused, very properly.

The act of 1819, ch. 42, sec. 1, enacts, that no person sued as endorser of any bond or note, shall plead any plea directly or indirectly, denying such endorsement, unless such plea be accompanied with an affidavit of the truth thereof. To permit proof to be received under the plea of non-assumpsit, that the endorsement was not genuine, would be a violation of this statute. If such defence is designed to be made under the plea of non-assumpsit, it must be accompanied with an affidavit of the truth of the fact.

The judgment is, therefore, affirmed.

PERDUE vs. THE STATE.

1. To sustain a conviction under the act of 1829, ch. 23, sec. 33, it is sufficient if the indictment charge the defendant with having kept the counterfeit bank note with a "fraudulent" intent to pass it. It is not necessary that the indictment should charge that it was kept with a *felonious* intent.

2. Where the bill of exceptions did not show, that the witnesses whose statements were set out were sworn, in the absence of proof to the contrary, it will be presumed, in favor of a correct administration of justice, that they were sworn.

3. Where the proof showed, that the defendant passed a bank note; that the note was fictitious; that he gave different accounts as to the person from whom he received it, and did not attempt upon trial to explain: Held, that such proof sustained a verdict of guilty.

4. Where the circuit judge charged the jury, that if the note was fictitious, and the prisoner knew it, and passed it in absolute payment of a debt, this would amount to a passing under the 31st sec., although at the time of passing it he might have agreed to take it back if it proved not to be genuine: Held, that this charge was correct, the offence consisting in the passing it with the knowledge that it was spurious.

5. The question as to defendant's knowledge of the spuriousness of the bank note, is a question for the jury.

T. D. Mosely, for the plaintiff in error.

Attorney General, for the State.

TURLEY, J. delivered the opinion of the court.

The prisoner was convicted of the offence of passing a counterfeit bank note, and upon appeal to this court, has assigned four causes for the reversal of the judgment of the court below.

1st. That the court erred in not quashing the second count in the bill of indictment. The objection to this count is, that it charges the prisoner with having fraudulently in his possession the counterfeit note with the intent to pass it, not using the word *felonious*, which it is contended is necessary to make the count good. We do not think so. It is true, the first section of the act of 1829, ch. 23, makes all the offences thereafter enumerated (of which this is one) felonies; but the 33d section of the statute which created the offence for which this count is filed, does not require that it shall be committed with a *felonious* intent, but merely with a *fraudulent* one; the count then charges the offence in the words of the statute, and is good.*

*See *Peek vs. The State*, ante, p. 78.

[Whaley vs. Moody.]

2nd. It is said, that there is no showing of record that the witnesses were sworn before examination. In the absence of proof to the contrary, this must be presumed in favor of a correct administration of justice.

3rd. It is said, that the proof does not support the verdict. We think otherwise. It shows that the note was fictitious, was passed by the prisoner, and that he gave different accounts as to the person from whom he received it, and he did not attempt upon trial to explain.

4th. It is said, that the court erred in charging the jury, "that if the note was fictitious and prisoner knew it, and passed it in absolute payment of a debt, this would amount to a passing under the statute, although at the time of the payment, he might have agreed to take it back, if it should prove not to be genuine.

This charge we think was correct. The prisoner's agreement to take back the note, is no justification of the offence of passing it; this the law would have compelled him to do without the agreement; his offence consisted in the knowledge that the note was spurious, and the question of knowledge is properly left by the charge to the jury.

The judgment will, therefore, be affirmed.

WHALEY vs. MOODY, *Adm'r.*

1. A partner has not the right to bind the firm by any contract not for the benefit of the firm, and legitimately within the line of its operations.

2. An endorsement of the firm name by one of the members of the firm, for the accommodation of a third person, does not bind the other members, unless the note should get into the hands of a holder for valuable consideration, without notice.

White, for Whaley.

Frierson, for Moody.

TURLEY, J. delivered the opinion of the court.

Richard F. Knott and William Knott were partners, trading in merchandize, under the style of R. F. Knott & Co. Richard F. Knott endorsed an accommodation note for Edward W. Dale, in

[*Estes vs. The State.*]

the name of the firm. Plaintiff became the second endorser, and has had the note to pay. William Knott is dead, and this suit is brought against his administrator, seeking to charge his estate as one of the first endorsers: and the only question is, whether he is bound by the endorsement made by his co-partner? and we are very clear that he is not. The law is well settled, "that one partner has not the right to bind the firm by any contract not made for the benefit of the firm, and legitimately within the line of its operations." An accommodation endorsement, therefore, made by one of the firm, does not bind the others, unless the note should get into the hands of an innocent holder, unaffected with notice, which is not the case here.

This subject is investigated in the case of *Crosswait vs. Ross*, 1 Humphreys, and decided as it now is.

The judgment of the circuit court, will, therefore, be affirmed.

ESTES vs. THE STATE.

1. In cases of conviction, in courts of record, for gross misdemeanors, it is a discretionary judgment at common law, to require sureties for good behaviour.

2. A single act of gaming, unaccompanied with circumstances of aggravation, is not such a misdemeanor as will authorise a court to require sureties for good behaviour.

3. Where a judge required a bond, that the defendant would not gamble in twelve months: Held, that no such special bond is authorised by law. The court (if the case had been such as authorised the exercise of the power) should have required a general bond for good behaviour.

Hollingsworth, for the plaintiff in error.

Attorney General, for the State.

GREEN, J. delivered the opinion of the court.

This is a presentment by the grand jury of Davidson county, against the plaintiff in error, for gaming at cards for the sum of six dollars. The defendant appeared in court and confessed the charge, and submitted to the mercy of the court. He was fined five dollars, and ordered to find sureties in the sum of one hundred

[Estes vs. The State.]

dollars, that "he would not be guilty of gaming for twelve months," and to remain in custody until the fine and costs were paid or secured, and until the recognizance, not to game as aforesaid, should be entered into.

From this judgment the defendant appealed to this court.

It is now insisted for the defendant, that the court had no power to require a recognizance with sureties, conditioned, that he would not game for twelve months.

The statute of 34 Edward 3, ch. 1, if in force in this State, which it is not necessary now to decide, does not apply to the case of a judgment of conviction for a misdemeanor, in a court of record. That statute empowered justices of the peace, to restrain "offenders, rioters and all other barrators," and those that have been "pillers and robbers" beyond sea, and will not "labor," and all "them that be not of good fame;" and to require of them "sufficient surety and mainprize of their good behaviour." Under this act, the words "not of good fame," were construed in England, to be of such latitude as to leave in a great measure, to the judgment of the magistrate, the character of person that would authorize him to require sureties for the good behaviour. 1 Hawk.Pl.Cr.486, sec.4. But in this country, many of the cases which the English books lay down, as proper for taking sureties for good behaviour, can have no application. Such are cases relating to offences against religion, as existing in the established church. Every man in this country has a right to worship God according to the dictates of his own conscience; and if he choose to refrain from attendance at church altogether, he is answerable only to his conscience and his God. So, accusing a justice of ignorance in the discharge of his office, would not justify binding the party to his good behaviour in this country. For although it would be *unmannerly*, yet our free institutions allow a much greater license of language towards public functionaries, than is thought consistent with good order in England.

But this act of Edward 3, is perhaps superseded by our act of 1801, ch. 22.

That act authorises the justice of the peace to issue a warrant, and cause to be brought before him, and to bind to his good behaviour, "any person who has no apparent means of subsistence, and neglects applying himself to some honest calling, and is found sauntering about, neglecting his business, and endeavoring to maintain himself by gaming, or other undue means." These words, "*other*

[Estes vs. The State.]

undue means," in our act, are of great latitude, and probably embrace all the cases, that, under our institutions, ought to be brought within the operation of this discretionary power of the magistrate. But these statutes, however important their provisions in regard to the jurisdiction of magistrates in the administration of *preventive justice*, do not apply to cases of conviction for a misdemeanor in a court of record. Binding to the good behaviour was a discretionary judgment, at the common law, after a conviction for a gross misdemeanor, before the passage of the statute of 34 Edward 3.

In Burns' justice, (vol. 4, p. 268,) it is said, "binding to the good behaviour, was a discretionary judgment, at the common law, given by a court of record, for an offence at the suit of the King, after a common law conviction by a verdict of twelve men." There is a great difference, he says, between what a court of record may do after a conviction, and what a single justice, out of sessions, may do.

So in 4 Blackstone's Commentaries, 352, it is laid down, that the requisition of sureties for good behaviour, is part of the penalty "inflicted upon such as have been guilty of certain gross misdemeanors." And this he says, is *preventive justice*; an honor to the English law, and upon every principle of reason, of humanity, and of sound policy, preferable in all respects to "*punishing justice*."

Upon these authorities we have no doubt, but that, at the common law, a court of record has a discretion to require sureties for good behaviour from a party, who shall have been found guilty of a gross misdemeanor, and that there is no change of the law in this respect in this State. If, as Blackstone says, it is an honor to the English law, "on grounds of reason, humanity and public policy," that such a power should exist in England, surely there is no ground, why these humane and conservative principles should not exist in our law.

In this respect, therefore, the common law, is the law of this State. But this power, although discretionary, must be exercised with a *sound legal* discretion by the circuit court. The misdemeanor must, according to Blackstone, be of a *gross* character, where this judgment is given. It does not follow, that because a party has been guilty of a misdemeanor, that he may be required to find sureties for good behaviour. The character of offence of which he may be guilty, must contain in *itself* that turpitude that would justify the appellation "*gross*" to the offence; or the evi-

[Estes vs. The State.]

dence must disclose circumstances connected with it, aggravating it to that character.

Thus, the offence of keeping a bawdy-house, is in its nature a *gross misdemeanor*; so also of a gaming-house, or disorderly-house. But the selling a single half pint of whiskey, unaccompanied with any other fact, although against law, and a misdemeanor, would not be a *gross misdemeanor*. But if it were to appear in evidence, that the party selling, was surrounded with drunken, noisy, obscene men, to the great annoyance of the public, this state of things, produced by his practice, and in part by the very whiskey he might be convicted of selling, would constitute *such* violation of the law, a *gross misdemeanor*. So, a libel might, or might not, be a *gross* offence, according as the circumstances of the publication, and its character, might mitigate or aggravate it. So, a game of cards might be played against law, but under circumstances, that would not justify, in this *legal* view of the subject, the denomination of a *gross misdemeanor*. But if it be played in connection with common gamblers, associated at a gaming-house, or as is some times the case, by the road-side on Sunday with *negroes*, it would be a *gross misdemeanor*.

These illustrations are only intended to indicate the general character of offence to which, we think, this power of requiring sureties, for the good behaviour, pertains.

According to this view of the subject, we do not think the case before us is such an one as to justify the requisition of sureties for the good behaviour.

The defendant, from the proof, appears to be a boy of industrious habits, laboring daily for a subsistence, and there are no circumstances connected with the game at which he played, that authorises us to say it is a *gross misdemeanor*, unless we were to say, that *all* gaming falls within this appellation, which we are not prepared to do. But the bond which the defendant was required to give in this case, is not authorised, either by the British statute, or our act of assembly, or by the common law. He was required to find sureties, that he would not *game* for twelve months. Such special bond is no where authorised that we have been enabled to discover. If the case had been a proper one for such judgment, a recognizance, with securities for good behaviour generally, would have been the proper form of the undertaking.

We, therefore, reverse the judgment, and proceeding to render

[Polk vs. Plummer, et als.]

such judgment as the circuit court should have given, it is adjudged, that the defendant pay a fine of five dollars, and remain in custody, until the said fine, and the costs of the circuit court shall be paid.

POLK, Governor, vs. PLUMMER, et als.

1. The act of 1837, ch. 107, sec. 9, requires the cashier of the Bank of the State and its branches, to give bond with security for the performance of his duty, payable to the governor of the State. Dale, cashier of the branch at Columbia, gave the bond payable to Newton Cannon, governor, and his successors in office. Suit was instituted on this bond in the name of James K. Polk, governor of the State of Tennessee, for the use of the president and directors of the Bank of the State of Tennessee: Held, that when a statute directs bonds for the public benefit to be made payable to the governor, or other functionary having legal succession, the office is the payee, and the successor, whether described, *eo nomine*, either in the statute or bond or not, may maintain the action, such officer being made by form of the statute, and for the public benefit, *quoad hoc*, a corporation sole.

2. Bonds and other deeds may be good in part and void for the residue, where the residue is founded in illegality, but not *malum in se*; and this is so, not only with regard to bonds or deeds containing conditions, covenants or grants not *malum in se*, but also with regard to those containing conditions, covenants or grants, illegal by the express provisions of statutes.

3. The only exception to this rule, is where the statute has not confined its prohibitions to the illegal conditions, covenants or grants, but has expressly or by necessary implication annulled the whole instrument to all intents and purposes.

In the year 1837-8, the legislature passed a law establishing a State bank with branches. One of these branches was located at Columbia. The law required that the cashier of each of these branches should "give bond with two or more securities to the satisfaction of the directors, payable to the governor of the State, in a sum not less than one hundred thousand dollars, conditioned for the faithful performance of his duty." E. W. Dale was appointed cashier of the branch at Columbia, and gave bond on the 9th day of July, 1839, with Turney, Plummer, Johnson and Duncan as his securities. They bound themselves by penal bond "unto Newton Cannon, governor of the State of Tennessee, and his successors in office, in the sum of one hundred thousand dollars."

This bond recited that it was to be void upon condition, first, that said Dale should perform all the duties of the office with fidel-

[Polk vs. Plummer, et als.]

ity; second, that he should indemnify the bank for all losses and damages that might be sustained by reason of any default, neglect, fraud, failure or delinquency of said Dale; third, the condition of the bond recited that, it was agreed that "one recovery shall not satisfy or discharge this obligation," but that it should be good and available against them, "notwithstanding any previous recovery or recoveries, so long as any cause of action" should "exist against them."

It further recited, that "no temporary or occasional absence of the cashier from the bank" should "impair the validity of this bond."

During the time which said Dale occupied the office of cashier, some thirty or forty thousand dollars had been illegally and clandestinely abstracted from the bank. The legislature directed the district attorney, James H. Thomas, to institute suit upon the bond against Dale and his securities. In accordance with this mandate, Thomas, on the 23d day of May, 1840, instituted an action of debt for the penalty of the bond above set forth, in the circuit court of Maury county, against Dale, Turney, Plummer, Johnson and Duncan. The writ was in the name of James K. Polk, governor of the State of Tennessee, for the use and benefit of the directors and directors of the Bank of the State of Tennessee.

The attorney general filed the declaration upon the bank, at the August term, 1840, in which it was charged that Dale had not performed his duties with fidelity, and that he had not indemnified the bank against all losses, &c., with other breaches, which it is not necessary here to set forth.

The defendants filed a demurrer to the plaintiff's declaration, and set down and assigned the following causes of demurrer:

1. The act of the general assembly, establishing the State bank and the branches, requires each cashier to give bond with two or more securities, "payable to the governor of the State," and the bond sued upon is not made payable as the law requires, but is made payable to "Newton Cannon, governor of the State of Tenn., and his successors in office;" the words "and his successors in office" not being authorised by law, said bond is not a good bond under the statute.

2. Said bond contains a provision that said cashier Dale should be responsible for losses which might accrue during his temporary absence, and a recovery on the bond, to the full amount of the

[Polk vs. Plummer, et al.]

penalty should not be a satisfaction of the bond, and other provisions and stipulations not prescribed by law, nor authorised by the statute.

The plaintiff joined in the demurrer, and the cause was continued till the July term, 1841, when it was argued before Dillabuntz, judge, who being of the opinion that the law was with the defendants sustained the demurrer. The plaintiff appealed in error to the supreme court.

Ewing and Thomas, for the plaintiff.

1. It is objected that the bond was not made in accordance with the statute in reference to the obligee. On this point, see 3 Monroe Ky. Rep. 391: 3 Wendall, 48: 3 Hawks, 167: Angell & A. on Corporations, 137-8, and the authorities there cited: Angell & Ames on Corporations, 16, and the authorities there cited: 4 E. Common Law Rep. 249: 3 Dev. 284: A. & A. on Corp. 55: 4 Haywood, 215: 4 Yer. 489: 1 Hay. 144: 4 Dev. 65.

2. It is objected that there are conditions inserted in the bond not authorised by the statute creating the bond, and oppressive upon the defendants. On this point see Comyn's Digest, Tit. Action M. 4: Covenant A. 2: Chitty's Pl. vol. 1, page 108: 4 Dev. 529: 2 Leigh's N. P. 740: *Wild vs. Clarkson*, 6 Term, 303: Hurls. on Bonds, 107: 2 Yerg. 71: 2 Saunders, 412: 6 East, 507: Hurlst. on Bonds, 33-4-5: *Minor, et als. vs. M. Bank of A.*, 1 Peters, 69: *A. B. vs. A.*, 12 Pickering, 303: 10 John. 27: 2 Hawks, 93: 12 Wend. 306: 1 Wend. 464: 17 Wend. 67.

Nicholson, for the defendants.

1. The bond on which this suit is brought, is made payable to Newton Cannon, governor of the State, and his successors in office. The action is brought by James K. Polk, as the successor of Newton Cannon. If it be a good statutory bond, the suit is properly brought; if it be not a good statutory bond, the suit should have been brought in the name of Newton Cannon or his legal representative. 10 Yerg. 465, *Hibbits vs. Canada*.

2. To make a good statutory bond, the requisitions of the statute must be pursued in all essential points, and no other or greater obligations must be imposed by the bond than the statute authorises. 4 Yerg. 156: 6 Yerg. 363: 2 Dev. 12.

I insist for the defendants, that the bond contains several provisions, each one of which imposes other and greater obligations

[Polk vs. Plummer, et als.]

than the statute authorises. The statute provides that every cashier shall give bond with two or more securities, payable to the governor, in a sum not less than one hundred thousand dollars, conditioned for the faithful performance of his duty. A bond made in pursuance of this authority must be a bond with a penalty. There is no restriction or limitation as to the amount of the penalty, except that it must not be less than one hundred thousand dollars, yet a definite sum must necessarily be adopted to be in conformity to the statute. Whatever amount might be adopted as the penalty of such bond would be discharged by one recovery on the bond in an action of debt.

Hence, if the bond taken, either, has no definite amount as a penalty, or if a stipulation is inserted, which would authorise more than one recovery, it cannot be a good statutory bond.

1. The bond sued on contains one hundred thousand dollars as a penalty, but after providing in the conditional part for the faithful performance of the duty of the cashier, in conformity with the statute, this further stipulation is added: that the said cashier shall also be responsible to, and indemnify the Bank of Tennessee for *all sums of money* that might become due, and *all losses or damages* that might be sustained by reason of any default, neglect or fraud of the cashier.

The statute, in providing for the taking of a bond, does not authorise it to impose any "responsibility" on the cashier to the Bank of Tennessee, nor to require the cashier to "indemnify" *the bank for losses or damages*. The only obligation prescribed is one to the governor of the State. Yet this condition in the bond creates a responsibility to the bank, which is a different obligation from that required by the statute. Again: This stipulation virtually and effectually enlarges the responsibility of the obligors to an indefinite amount beyond the penalty. If the bond had been made with a penalty of \$100,000, conditioned for the faithful performance of the cashier's duties, as the statute requires, then the securities to the bond could have been made liable for no more than the penalty for any default, neglect or fraud of their principal. 5 Bac. 156, (Obligations;) Cooke, 268: 2 Yerg. 71. But by this additional stipulation, they agree to be liable for "all sums" and "all losses or damages," although the amount might greatly exceed one hundred thousand dollars. The design of the draughtsman of the bond, no doubt was, to enlarge the responsibility of the obligors be-

[Polk vs. Plummer, et als.]

yond the penalty, for the purpose of securing any "losses" or "damages" over and above the amount of the penalty, and at the same time to avoid the rule of law which limits the liability of the securities to the penalty. This object has been attained; but the consequence is, that in effect it is made a bond without any definite penalty, which is in violation of the express requisition of the statute.

2. But to attain effectually the object of the draughtsman, it was not enough to stipulate for the indefinite enlargement of the responsibility of the obligors; there was still a principle of law, through which, liability beyond \$100,000 might be escaped. I allude to the principle that the liability upon the bond might be discharged after one recovery. Hence we find the further stipulation, that one recovery should not satisfy or discharge the obligation. By virtue of this stipulation, the obligors are precluded from relying upon the principle just stated, a principle which would attach to the bond, no matter how great the amount of the penalty, if drawn in pursuance of the statute. It is clear that if the bond had been taken in the penalty of \$100,000, with the stipulation that one recovery should not discharge or satisfy the obligation, still that amount of the penalty would be the utmost extent of the responsibility of the securities. But by virtue of the two stipulations, the one enlarging the responsibility indefinitely, and the other enlarging the remedy indefinitely, every possible chance of escape was provided against. Yet if the bond had conformed to the statute, the liability of the securities would have been measured by the penalty, and the remedy against them limited to a single recovery.

3. The bond provides, that no temporary or occasional absence of the cashier from the bank shall be averred or alleged as impairing the force of the obligation. If this stipulation mean any thing, it must mean that the obligors should be responsible in any event, even though a loss should accrue during a temporary absence, unconnected with negligence or fraud. That such was the design, we are forced to infer from the exceeding caution with which the whole bond was prepared; and if such was the design it surely imposes an obligation never contemplated by the statute.

The conditional part of a bond is for the benefit of the obligors, and is not to be construed so as to extend beyond the recital in the bond. 3 Saund. 412. As if the recital be that A. is appointed cashier for one year, and the condition is, that A. shall be responsible for

[Polk vs. Plummer, et als.]

losses during his continuance in the office; this will be construed to limit the obligation to losses occurring within the year. It is a rule of construction adopted in arriving at the intention of the parties, but can never be used to defeat that intention when expressed without ambiguity. The bond under consideration is an entire contract, and in construing it, the leading object of the court will be to ascertain the real intention of the parties. When the intention is plain, no rule of construction will be allowed to vary or alter it.

In the case now under consideration, the parties agree in the debtor part of the bond, that the obligors are bound in the sum of one hundred thousand dollars, and in the conditional part they agree that their liability shall be continuing, and that they will be responsible to and indemnify the Bank for "all losses or damages" that may occur. The court cannot, by any rule of construction, so alter or modify the plain intention of the parties as to say, that the obligors shall not be responsible for "all losses and damages," but that they shall only be responsible for \$100,000. That would be the making of a new contract for the parties.

Attorney General, in behalf of the plaintiff, in reply.

REESE, J. delivered the opinion of the court.

This is an action of debt upon a bond. E. W. Dale was appointed cashier of the branch of the State Bank at Columbia. The act establishing the Bank, (1837, ch. 107, sec. 9, art. 9,) provides that "every president and cashier, before he enters on the execution of his duty, shall give bond with two or more securities to the satisfaction of the directors, payable to the governor of the State, in a sum not less than one hundred thousand dollars, conditioned for the faithful performance of his duty." E. W. Dale and his securities gave bond in the penalty of one hundred thousand dollars, payable to Newton Cannon, governor of the State of Tennessee, and his successors in office, "conditioned that Dale should well and truly, and with diligence, integrity and fidelity discharge and perform all and singular the duties appertaining to the said office, and should be responsible to and indemnify the Bank of Tennessee, for all sums of money that might become due, and all losses or damages that might be sustained by reason of any default, neglect, fraud, failure or delinquency of the said Dale, (which it was thereby cov-

[Polk vs. Plummer, et als.]

enanted that he should do and perform,) then the obligation to be void," &c. After this, in the above bond, is found the following: "And it is understood and agreed that one recovery shall not satisfy or discharge this obligation, but that it shall be good and available against us, notwithstanding any previous recovery or recoveries, so long as any cause of action exists against the said E. W. Dale, cashier as aforesaid, and that no occasional or temporary absence of said cashier from the said branch of said Bank, shall be averred or alleged as impairing the force of this obligation, or of said conditions, but that the same, notwithstanding any such absence, shall continue in full force and virtue." Suit upon this bond was brought in the name of James K. Polk, governor of the State of Tennessee. A demurrer was filed to the declaration, which the circuit court upon argument saw proper to sustain, and the plaintiff in error has appealed to this court.

Two questions have been discussed before us. 1. As the statute directs that the bond shall be made payable to the "governor of the State," and as the bond in the record was made payable to "Newton Cannon, governor of the State of Tennessee, and his successors in office," whether James K. Polk, although governor of the State, and successor of Newton Cannon in office, can maintain the action? For the plaintiff it is said that the action may well be brought either in the name of "the governor of the State" without more, or in the name of the governor at the time, or if not in office, in the name of his successor, stating himself as governor; that the bond and the action in this case are according to the legal effect of the statute, and sufficiently pursue it; but even if this were not so, that the words "Newton Cannon," "successors in office" and "James K. Polk" may all be rejected as surplusage, and then the bond and the action are in the name of the "governor of the State;" that when a statute directs bonds for the public benefit, to be made payable to the governor or other functionary, having legal succession, the office is the payee, and the successor, whether described, *eo nomine*, either in the statute or bond, or not, may yet maintain the action, such officer being made by form of the statute and for the public benefit, *quoad hoc*, a corporation sole. Upon this branch of the case, the counsel for the plaintiff have referred to various authorities; among others to 1st Hay. 144: 4 Ba. Ab. 411: 4 Rep. 65: 4 Inst. 249: Strange, 452: 4 Dev. 656.

The counsel for the defendants in this court, do not controvert

[Polk vs. Plummer, et als.]

the point which these authorities were cited to maintain. And we think on this branch of the case no obstacle exists in the way of the plaintiff maintaining this action.

2nd. In the second place it is contended; that this bond is statutory, made payable to a public functionary, having no right, or power, or interest, apart from the statute, to take any bond at all touching the duties and functions of a cashier of a bank, and that, therefore, no other, or different bond can be taken by him, than that which the statute designates; and that if other and different stipulations than those pointed out by the statute be inserted in such a bond, it is thereby rendered void, not as regards such other and different stipulations merely, but so much also of the bond, as may be conformable to the statute; that in the bond before us, the superadded conditions, or stipulations on the subject of one recovery not satisfying or discharging the obligation, and on the subject of the temporary or occasional absence of the cashier, are of this character, and make the whole bond bad, and void as a statutory bond.

On the other side it is said, that these superadded stipulations may be void, and if void, they do not invalidate the balance of the bond, that they stand distinctly apart from the other stipulations, are readily separable from them, and that in fact, without these stipulations the bond is entire, complete and in exact conformity with the statute.

This question has profited by the ample research, and clear and vigorous discussion of Mr. Justice Story, in the case of the *United States vs. Bradley*. That case indeed has exhausted the subject. The court there remark: "That bonds and other deeds may, in many cases be good in part, and void for the residue, when the residue is founded in illegality, but not *malum in se*, is a doctrine well founded in the common law, and has been recognized from a very early period;" and Mr. Justice Story goes on to show that the case was the same, when the illegality arises under a statute, except in some cases, such as those under the statute of 33 Henry 6, ch. 9, as to sheriffs taking bonds, which are in terms by the statute declared void, unless taken as set forth therein.

And having reviewed several cases in England and the United States, he concludes with this general declaration, that "there is no solid distinction, in cases of this sort, between bonds and other deeds, containing conditions, covenants or grants, not *malum in se*;

[Polk vs. Plummer, et als.]

but illegal at the common law, and those containing conditions, covenants or grants, illegal by the express prohibitions of statutes. In each case, the bonds or other deeds are void as to such conditions, covenants or grants, which are illegal, and are good as to all others which are legal and unexceptionable in their purport. The only exception is, when the statute has not confined its prohibition to the illegal conditions, covenants or grants, but has expressly or by necessary implication, avoided the whole instrument to all intents and purposes."

In the same case, Judge Story remarks, that "a bond may by mutual mistake or accident, and wholly without design, be taken in a form not prescribed by the act. It would be a very mischievous interpretation of the act, to suppose, that under such circumstances, it was the intendment of the act, that the bond should be entirely void. Nothing, we think, but very strong and express language should induce a court of justice to adopt such an interpretation. When the act speaks out, it would be our duty to follow it. When it is silent, it is a sufficient compliance with the policy of the act, to declare the bond void as to any conditions which are imposed upon a party, beyond what the law requires. This is not only the dictate of the common law, but of common sense." It is true, indeed, that in the case of the *United States vs. Bradley*, as well as in other cases, the court held, that the United States being a body politic, had a general power to hold voluntary bonds in the absence of statutory enactments. But the reasoning of the case does not proceed upon that distinction, and the discussion is not based upon that principle. The result, it would seem, would have been the same, if the bond in question had, by the statute, been made payable to the Secretary of War, of the Treasury, or other person. The general principle embraces both cases. Whether the bond, by the statute, be payable to the United States, or to some public functionary for their benefit, the conditions not imposed by the statute are void, and the balance good. And the court refers, as an authority to sustain their judgment in the case of the *United States vs. Bradley*, to the case of the *Supervisors of the county of Alleghany vs. Van Campen*, where the payees of the bond had none other than statutory power to take the bond. 3 Wend. 48. So also in a late case in England, in the Common Pleas, it was held by all the judges, that a bond payable by a collector of taxes to commissioners of the revenue, which in part did

[Polk vs. Plummer, et als.]

not pursue the statute, was void as to that part, and good as to the balance. Tindal, C. J., remarked, "that the rule of law is, that if a bond be conditioned for the performance of a thing, *malum in se*, or against a positive law, not only is the condition void, but the bond also, and the question is whether the conditions of this bond are for the performance of a thing *malum in se*, or contrary to the statute under which the bond was taken. If the conditions had been solely to pay to the commissioners, it would have imposed an illegal act, and the bond would have been void. But it becomes unnecessary to consider that, because there is a separate condition under which the obligor is to pay to the receiver general. I cannot see why we are to call in aid a distant condition which may be illegal, to vitiate that which is clearly legal. Gaselee, judge, said, "there is no provision in the act, that the bond shall be taken in any particular form, and the condition to pay to the commissioners, does not render the whole bond void. In *Newman vs. Newman*, 4 M. & S. 66, Lord Ellenborough, C. J., said, "admitting the condition of the bond to be ill, as to one part of it, it seems it may be well as to the other parts; for you may separate at the common law the bad from the good." 7 Bingham, 423.

The question therefore, in general, and also as to bonds merely statutory, seems upon authority well settled, and that superadded and distant conditions, not imposed by the statute, may be rejected as illegal, and the conditions required by the statute be enforced as valid. In the case before us, it will be observed that the directions of the statute are comprised in very general language; the form of the bond is not prescribed. To hold in such a case, that if the draughtsman of the bond, in filling up its conditions in detail, should insert some, which might be construed as not falling within the general scope of the statute, the entire bond should be thereby rendered void, would be of most mischievous consequences, injuriously affecting all the fiscal interests of the State, and all the fiduciary relations of society committed to the public ministration. As the superadded conditions in the case before us, may be rejected as void, it is scarcely necessary to inquire into their meaning and legal effect. If the clause, relating to one recovery not discharging the obligation, be understood to refer to actions of covenant within the limits of the penalty, then it only asserts what the law would operate without it. If it is to be understood to mean, that more than one recovery of the penalty may be had, then it is re-

[Martin vs. Fancher.]

pugnant to law, the rules of which it is not competent for individuals by their contract to set aside, and would for that reason be void. We know not whether the other stipulation about absence, would or would not enlarge the measure of accountability intended by the statute. It is unnecessary here to inquire. The stipulation, if not imposed by the legislative intention, may be rejected.

There is somewhat a numerous class of cases in our own books of Reports which have been referred to in the discussion. But these cases were upon other principles. They were not suits according to the course of common law, but summary, and often *ex parte* proceedings upon motion, and in most of them the penalty of the bond differed from that presented by the statute, a difference effecting the whole bond. The principle of these cases, therefore, is not in conflict with the conclusion at which we have arrived in the case before us. Upon the whole we are of opinion, that the judgment of the circuit court must be reversed, the demurrer be overruled, and the cause be remanded to the circuit court for further proceedings.

MARTIN vs. FANCHER.

A court of chancery will entertain jurisdiction for the purpose of decreeing the surrender of slaves; yet it is necessary to its exercise in every case, that the complainant's right should be clear and unquestionable.

This bill was filed in the chancery court at Livingston, Overton county. It was heard on bill, answer, replication and proof, before Ridley, chancellor, at the September term, 1841, and the slave claimed by the complainant decreed to be delivered to complainant. Defendant appealed.

The facts of this case are stated in the opinion of the court.

Turney, for the complainant.

Cullom, for the defendant.

REESE, J. delivered the opinion of the court.

This is a detinue bill for a negro man slave, named Jacob. The bill alleges that complainant hired the negro for a short time to his

[Martin vs. Fancher.]

son Wm. G. Martin, and that he, without his consent, sold him to one Robert Officer, and the latter sold him to the defendant.

It appears from the proof, that executions were in the hands of the sheriff of White county, against the complainant and his son, for about the sum of nine hundred dollars, and that complainant directed his son's wife to tell her husband to "hurry" and sell the negro to Officer; upon which Officer, as the agent of defendant, agreed to give for the slave nine hundred dollars, having been furnished by the defendant with that sum of money. Officer and the son applied to the complainant for a bill of sale, which he declined giving, stating at the time, that he would do so when receipts should be produced to him from the sheriff. Officer left with the son the sum of eight hundred dollars, holding himself liable, he says, to pay the remaining one hundred dollars when called on. The son paid three hundred dollars in discharge of one of the executions, in money of the same description received from Officer, and subsequently a negro woman of the son was sold for about six hundred dollars to satisfy the other execution, and purchased by the complainant, but whether from the proceeds arising from the sale of Jacob, or on what other terms does not appear. These facts show:

1st. That it was the purpose of the complainant, that the money to satisfy the executions against himself and his son, should be raised by a sale of Jacob.

2ndly. That although he intended to withhold a bill of sale till the proceeds of the sale were applied to the satisfaction of the executions, still he expected the purchaser to advance the money. The purchaser did advance the money, and the son did apply a portion, if not all of it, as intended.

Under such circumstances he cannot invoke the aid of a court of chancery, successfully, to have the surrender of the negro to him decreed. But on the contrary, his claim will be repelled.

For although this court, with regard to slaves, will entertain jurisdiction for such a purpose; yet it is necessary to its exercise in every case, that the complainant's right should be clear and unquestionable.

The decree of the chancellor, therefore, will be reversed, and the bill be dismissed, but at mutual costs, and without prejudice.

DUNN vs. WINTERS.

1. Any malicious publication expressed by printing or writing, by pictures or signs, tending to injure the character of an individual or diminish his reputation, is a libel.

2. The fact of the publication of a libellous statement, is *prima facie* evidence of malice.

3. Wherever the author of an alleged libel, acted in the *bona fide* discharge of any public or private duty, whether legal or moral, or in the prosecution of his rights or interests, no action can be maintained against him, without proof of malice in fact.

4. Winters expressed the opinion, founded on the statements of others, that Dunn had maliciously killed his horse, and was arraigned therefor by Dunn before a church judicatory, and thereupon produced, in self-defence, the certificates of the individuals upon whose authority he made the statements: Held, in the absence of proof of malice in fact, no action for a libel would lie.

5. There are matters of defence in actions for a libel or slander, which, though admissible in evidence under the general issue, may be also specially pleaded. Whenever the occasion of the speaking or publishing furnishes a defence to the action, it seems it may be specially pleaded.

This is an appeal in error from the October term, 1841, of the circuit court of Robertson county.

Meigs, for Dunn, cited, 10 John. 447: 8 John. 455.

Cook, for Winters.

GREEN, J. delivered the opinion of the court.

This is an action for a libel. The declaration alleges, that the defendant published a certificate of several persons, stating in substance, that two horses had been maliciously killed by some person; that pursuit was made after the perpetrators; that the pursuers went to the house of the plaintiff, and from his answers, looks and conduct, they were convinced that "he was a party concerned, or knowing to that wicked act." And, also, the certificate of two other persons, who state, that they measured the track of a man, who had been at the place where the horse was killed, and saw the measure applied, and that "it so fit, and his shoes so featured with the tracks, together with his guilty looks, together with other circumstances connected thereto, convince us that the said J. C. Dunn was guilty of doing, or knowing to be done, the within named crime."

[Dunn vs. Winters.]

The defendant pleaded, that the defendant and plaintiff were members of the Red river Baptist church, in Robertson county; that the persons whose names were signed to the above certificates, had told him the facts stated in them, which were believed by him, and that he expressed that belief; that plaintiff accused him before the church, for giving expression to his opinion, and that, to defend himself, he produced said certificates, and exhibited them before said church; and that the publication was made to defend himself, *honestly* and *bona fide*, and not *maliciously*, as the declaration alleges.

To this plea the plaintiff demurred, which was overruled by the court, and the plaintiff appealed to this court.

Any malicious publication, expressed in printing or writing, or by pictures, or signs, tending to injure the character of an individual, or diminish his reputation, is a libel. 2 Leigh's N. P. 1360.

The fact of the publication of a libellous statement, is *prima facie* evidence of malice. But a libel may be published in an *innocent sense*, and upon an occasion that warrants the publication. 1 Chitty's Pl. 529: 2 Leigh's N. P. 1363. And this is the case whenever the publication is made *bona fide* in the discharge of any public or private duty, whether legal or moral, or in the prosecution by the party, of his rights or interests. 2 Leigh's N. P. 1363.

Upon these principles the question is, did not the occasion of the publication charged in this declaration, as set forth in the defendant's plea, justify him in making it? We think it did.

He was charged before the church, by a fellow-member, of having expressed a false and slanderous opinion of him. He had a right to defend himself, by showing that he had expressed the opinion upon grounds that would exempt him from the charge of malice against his brother, or of having originated the statement. This could be done only by producing the evidence of the men from whom he had derived this information. That evidence is contained in these certificates, and the plea avers, that they were used *bona fide* for his defence, and not maliciously as charged.

We think, therefore, the statement contained in the plea, constitutes a good defence to this action.

But it is said, this plea amounts only to the general issue, and is, therefore, bad. It is true, these facts might have been given in evidence, under the general issue, but it does not follow, that they may not be pleaded specially.

[Simpson, et al, vs. Young, et als.]

Chitty, treating of this subject, says, "But in most of the foregoing instances, the defendant *might have* pleaded those matters specially, for a defendant should never be compelled to rely alone on the general issue, when he confessed the words, and justified them, or confessed the words, and by special matter, showed they were not actionable." 1 Chitty's Pl. 129.

In Leigh's N. P. 1381, it is laid down, that although evidence, showing that the occasion of publishing the words was such as to furnish a defence to the action, may be given in evidence under the general issue, it may also be specially pleaded, and that this is the safer course.

We think, therefore, that the plea in this case is a good defence, and well pleaded, and that the court below did not err in overruling the plaintiff's demurrer. Let the judgment be affirmed.

SIMPSON & CHOAT vs. YOUNG, et als.

A joint action will lie against a surviving partner and the representative of the deceased partner.

In October, 1839, Simpson & Choat instituted an action of assumpsit in the circuit court of Wayne county, against R. Altom and C. Forsythe, administrator and administratrix of John Forsythe, deceased, and against Walker, Young & Polk, surviving partners of the firm of Forsythe, Walker & Co.

The declaration showed, that the contract sued on, was a joint assumption of John Forsythe, deceased, and of Walker and the others, surviving partners of John Forsythe.

A verdict was rendered in favor of the plaintiffs for the sum of fifty-nine dollars.

The defendants moved an arrest of judgment, which motion, Totten, judge presiding, prevailed, and the judgment was arrested. The plaintiffs appealed in error.

Rose, for the plaintiffs.

R. Houston, for the defendants.

[Simpson, et al. vs. Young, et als.]

RESE, J. delivered the opinion of the court.

The question in this case is, whether a joint action can be brought against the surviving partner of a partnership concern, and the representative of a deceased partner?

The act of 1789, ch. 57, sec. 5, provides, that a joint debt or contract shall survive against the representative of a deceased obligor, and that in all cases of joint obligations or assumptions of co-partners or others, suits may be brought and prosecuted on the same in the same manner as if such obligations or assumptions were joint and several.

But it is said, that at common law, if the contract were several, or joint and several, the executor of the deceased may be sued in a separate action, but he cannot be sued jointly with the survivor, because one is to be charged *de bonis testatoris*, and the other *de bonis propriis*, and that the statute produces no change in this respect.

This common law reason would prevent the revival of a suit pending under such circumstances against the representative of the party dying, but we have various statutes providing for such revival; and our act of 1813, ch. 67, prevents separate suits being brought at the same time on joint obligations. Moreover, our practice is fixed and universal on the subject, and suits are constantly brought, and without question from any quarter, against the surviving obligor or partner and the representative of the deceased, and judgments given against the one *de bonis propriis*, and against the other *de bonis testatoris*.

The judgment of the circuit court will be reversed.

BRIDGES vs. VICK.

1. Where a cause depending in court is submitted to arbitration by a rule of court, and the award is to be made the judgment of the court, this submission to arbitrators does not operate as a discontinuance of the cause.

2. The circuit judge in his charge to the jury, should confine himself to an explicit statement of the principles, which, in his judgment, have an immediate application to the case before him, and his not having charged the jury on every point which might have had some bearing on the points in controversy, will not be regarded as error, more especially if he is not requested to charge upon such points.

This action was brought by Vick against Bridges in the circuit court of Wilson county, on the 11th day of June, 1839. Plaintiff declared an assumpsit on a special contract of hiring, and the defendant pleaded non-assumpsit, and other pleas which need not be set out as the case did not turn upon them. Issue was joined on the plea of non-assumpsit. At the February term, 1840, the parties came into court and obtained an order of court that their case should be submitted to arbitration. This order was made. By the terms of the order the award was to be returned and made the judgment of the court. At the May term succeeding, the order of reference was renewed. At the September term, the following entry was made: "The order heretofore made referring this cause to arbitration is set aside, and the cause ordered to stand for trial at the next term."

At the May term, 1841, it was submitted to a jury, Judge S. Anderson presiding. The facts, so far as it is necessary here to set them forth are these. Hays and Bridges were partners in the surveying business, and engaged the services of Vick on a surveying expedition to Arkansas, at the rate of \$15 per month. They were also to pay his expenses in going to and returning from Arkansas. Vick went to Arkansas, and was there told by Hays that no profitable job of surveying could then be got, and that he might seek such other employment as he could get. It does not appear that Vick either assented to this arrangement or expressed his dissatisfaction at it. This was in November. He did get other employment, and was engaged in chopping wood and driving a wagon. Hays paid Vick seven dollars and fifty cents, and Vick retained two axes and a blanket, the property of Hays.

There was proof tending to show that Vick was in Arkansas in

[*Bridges vs. Vick.*]

March following, ready to engage in the business of Bridges and Hays. The judge charged the jury that if after Hays and Vick got to Arkansas, Hays dismissed Vick with his assent, Vick was not entitled to recover, and if without his consent he was entitled to recover, and that if he merely permitted Vick to get other employment until Hays should get ready to go to surveying, in that event the defendant would be liable to Vick, but Vick must account to Bridges for his earnings.

The jury rendered a verdict in favor of the plaintiff for the sum of \$87 50. A motion for a new trial was made and overruled, and judgment rendered on the verdict. Defendant appealed in error.

R. M. Burton, for the plaintiff in error.

Stokes, for the defendant in error.

GREEN, J. delivered the opinion of the court.

1. It is contended in this case, that the order of reference was a discontinuance of the cause, and that the court had no power after the submission to proceed in the cause; and the case of *Jewell vs. Blankenship*, 10 Yerg. 437, is relied on.

In that case, the submission of the cause to arbitration was made out of court, by agreement of the parties. In such case the court held it was a discontinuance of the cause in court. See, also, 1 Jh. Rep. 315: 18 Jh. 22. But here the submission was by a rule of court. The cause was still in court, to await the award, which, by the terms of the submission, was to be made the judgment of the court. The arbitrators made no award, and the court proceeded with the cause. This it clearly had the power to do. *White vs. Puryear*, 10 Yerg. 441: *Watson on Arb. and Aw.* 25.

2. It is objected, that the court did not charge the jury that the assent of Vick in leaving the employment of Hays might be inferred from his conduct, in seeking other employment. The facts of the case did not call for such a charge from the judge. The employment in which Vick engaged, was that of a day laborer, and did not at all interfere with his readiness to attend Hays in his surveying at any moment his services might be required. Besides, the judge was not requested to give the charge suggested, and we cannot regard as error, the failure of the court below to charge every proposition that may possibly have some remote application to the

[Webster vs. Fleming, et al.]

case; such a course would rather tend to bewilder than to enlighten the jury. In declaring the law to the jury, it is highly proper for the judge to confine himself to a clear and explicit statement of those principles, which, in his judgment, have an immediate application to the facts of the case before him.

3. Upon the facts of the case, there is no ground for a new trial. There is no evidence what amount Vick earned chopping wood and driving a waggon in Arkansas, and therefore we cannot see that the jury has not made a sufficient allowance for the profit of such work, and for the axes and blanket retained by Vick. There is, therefore, no error in the judgment.

Let the judgment be affirmed.

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WEBSTER vs. FLEMING and FRIERSON.

1. A riparian proprietor has a right to divert the water of a stream from its natural channel, and use it higher or lower than the natural channel, provided he return the water to its natural channel before it leaves his land.

2. Where the upper proprietor diverted the water of a stream from its natural channel, by means of an artificial channel, and placed his mill on such artificial channel at a lower point than could be obtained in the natural channel, and the wheels of his mill were overflowed by the back flowage of a dam below: Held, that the proprietor of the mill below had no more right to impede the operation of the mill of the upper proprietor so situated, than he had to overflow his lands.

3. Although the judge may charge the jury erroneously, yet if there be no proof in the record to which such charge is applicable, it furnishes no ground of reversal, as it could not have misled the jury.

This action on the case, was tried at the August term, 1841, of the circuit court of Maury county, Judge Dillahunt presiding, and resulted in a verdict of one hundred and fifty dollars for the plaintiffs, and judgment thereupon.

The defendant, Webster, appealed in error.

Nicholson, for the plaintiff in error, cited, 3 Kent, 439: Angell on water courses, 11, 12: 3 Rawle, 84: 17 John. 306: 6 East, 206: 1 Sim. & Stu. 190: 4 Dallas: 2 Conn. 584: 12 Wend. 330.

Frierson, for the defendants in error.

[Webster vs. Fleming, et al.]

REES, J. delivered the opinion of the court.

This is an action on the case, brought by Fleming and Frier-son against Webster, in the circuit court for Maury county, for erecting a dam so high as to flood the mill of plaintiffs, and thereby obstructing it in beneficial and profitable operation.

They obtained a verdict and judgment, to reverse which, Webster has prosecuted his appeal in error to this court.

The judge presiding at the trial, was asked by the counsel for defendant to charge the jury, that the riparian possessors of the stream had a right to use the stream passing through their own lands, so as not to injure the rights of those owning lands above and below; but that this was to use the water in the natural channel, and that if plaintiffs had since the erection of defendant's mill, cut an artificial race or channel, and had located their mill upon said race or channel, at a point below the level of the natural channel of the creek, and if their mill were thereby flooded from defendant's dam, when it could not have been flooded if placed at a corresponding site on the natural channel of the creek, that plaintiffs could not then recover.

This his honor refused to charge, but told the jury, that the owner of the land would have a right to divert the water and use it at a higher or lower point, provided he again returned the stream to its natural channel before it left his land, and that he might build his mill upon an artificial race, at a point lower than the natural bed of the creek, and that if defendant's mill flooded plaintiffs' at this situation, lower than the channel of the creek, he could recover just as though the mill were situated on the natural channel.

As to the charge of the circuit court, two observations may be made:

1st. If it were erroneous, it would constitute no ground for reversal in the case before us: because, so far from there being any evidence in the record to show, that the mill wheels of the plaintiffs, were in fact placed below the level of the channel of the creek, the uncontradicted testimony in the cause, fully establishes, that the wheel machinery of the mill was suspended above the natural level; and, therefore, the supposed error of the court could not have misled the jury with reference to any fact proved in the cause.

But in the second place, what was said by the court, is not er-

[Polk vs. Wisener, et als.]

roneous. For if the water flowing in the artificial channel were returned by it to the natural channel, before it left the land of the plaintiffs, it is not perceived how any depression in this artificial channel at or above, or below the site of the mills, could authorise or justify the proprietor of the mill below to overflow the lands of the owner above, and thus reach to and obstruct his mill.

True, the action here, is not for overflowing the lands, but for obstructing the mill of the plaintiffs. But it is not perceived how that can make any difference, or how the acknowledged right of the plaintiffs to repel the defendant from overflowing their lands, can exist, and the right to repel him from overflowing their mill, not exist also, upon the supposition, that they having used the stream according to their legitimate power, have returned it, while still upon their own premises, to its proper and natural channel.

Let the judgment be affirmed.

POLK, Gov. vs. WISENER, et als.

1. The county court have no power to discharge a part of the securities in an administration bond, without, as a necessary consequence, discharging the balance.

2. The county court have no power to release the securities in an administration bond, without making other provision for the security of [the estate, and therefore where the court made an order discharging a part, without making further provision, such order of discharge was void, and all were liable on the bond.

3. If securities petition for a discharge, and the administrator do not give other and sufficient securities, the court may take it out of the hands of the administrator and place the estate in the hands of the petitioner, or other fit person, and in such event the petitioning security is liable only for the past misbehaviour of the administrator.

Leonard C. Temple was appointed administrator of Elizabeth Temple, by the county court of Bedford, on the 1st day of February, 1836, on which day he executed the usual bond for the administration of the estate, with Israel Fonville, Asa Fonville, Jas. W. Jones and Samuel Escue, sureties.

From this bond the Fonvilles were released by the county court at the April session, 1837; and thereupon a new bond was executed, with Samuel Escue, J. A. Blakemore, Wm. H. Wisener, G. W. Fogleman and C. D. Steele, sureties.

[Polk vs. Wisener, et als.]

At the November session, 1837, of the county court, Wisener and Fogleman, two of the last sureties, were released, and no other bond was afterwards taken. On the 12th of February, 1840, this suit was brought against all the surviving sureties in the second bond, and the executor of Escue the deceased surety. This is an action of debt, instituted in the circuit court of Bedford county, in the name of the governor, for the use of the distributees of Elizabeth Temple, for \$10,000, the penalty of the bond; and the breaches are, that the administrator made and exhibited no inventory within ninety days; that he did not well and truly administer, &c.; that he did not account for his administration, and that he did not pay over the residue.

Blakemore and Steel pleaded, 1st, that Wisener and Fogleman had been released, and without notice to them, or their consent; 2nd, covenants performed by the administrator; 3d, that the second bond is illegal and void, because the time for making and returning the inventory and settling the estate was extended thereby. Demurrer to the 1st and 3d pleas, and issue on the 2nd.

Tilman, executor of Escue, pleaded, 1st, that Wisener and Fogleman had been released, and without notice or consent; 2nd, fully administered. Demurrer to the 1st, and issue on the 2nd.

Wisener and Fogleman, pleaded, 1st, their release from the 2nd bond; 2nd, that Leonard Temple never was administrator; 3d, covenants performed by them; 4th, that the 2nd bond was illegal and void, because the time of making an inventory and settlement was thereby extended, &c. Demurrer to the 1st, 2nd and 4th pleas, issue on the 3d.

These demurrers were sustained; the issue of fully administered was found in favor of Tilman, and issues on the pleas of covenants performed were severally found against the defendants.

Thereupon Wisener and Fogleman obtained leave to file an additional plea, in which they set up their release from the second bond in a more formal manner, to which the plaintiffs demurred, and the demurrer was overruled, and judgment that they go without day, &c. And the court then gave judgment on the verdict against Blakemore and Steel for \$2780 19, to be levied of their own goods, and against Tilman, *quando acciderint*.

From the judgment in favor of Wisener and Fogleman, the plaintiffs appealed in error, as did also Blakemore and Steel from that against them.

[Polk vs. Wisener, et als.]

Ready and Sneed, for the plaintiffs.

Meigs and Nicholson, for the sureties.

TURLEY, J. delivered the opinion of the court.

The question presented for consideration in this case is, whether the county court has power, under the provisions of the act of 1813, ch. 119, sec. 5, to release the securities of an administrator, without making some further provision for the security of the estate? The facts out of which the question arises, are as follows:

Leonard C. Temple was appointed administrator of Elizabeth Temple, by the county court of Bedford county, on the 1st day of February, 1836, and gave bond for the performance of his duties, with Israel Fonville, Asa Fonville, James W. Jones and Samuel Escue as his securities. At the April term, 1837, of said court, said securities, upon the joint application of themselves, and the administrator, were released from any responsibility upon the bond, and a new one taken with Samuel Escue, J. A. Blakemore, W. H. Wisener, J. W. Fogleman and C. D. Steel as securities.

At the November term of said court, 1837, Wm. H. Wisener and J. W. Fogleman, two of the last securities, were released by the court, and no new bond taken, the court being of the opinion, that the other parties to the bond were sufficient. The first proposition involved is, did the court have power to release two of the sureties, without, as a necessary consequence, releasing the whole? This is a question not debateable; there is nothing in the statute giving such power, and the exercise of it is at war with the principles of justice and the adjudged cases. The second is, did the court have the power to release the bond, without taking further steps to secure the estate? The duty of the county court in providing for the correct administration of estates, is ministerial and not judicial, and therefore, like others, acting under direct authority, they are bound to a strict compliance with their power. The act of 1715, ch. 48, requires, "that a bond with two or more sufficient securities shall be taken, before letters of administration shall be granted upon an estate." The act of 1813, ch. 119, provides, "that securities for administrators who consider themselves in danger of becoming liable, by reason thereof," may apply by petition to the county court for relief, which may be granted accor-

[Polk vs. Wisener, et als.]

ding to circumstances. It is the 5th section of the statute, which makes the provision; it reads in the following words:

"In all cases, wherein any person may become bound as security for any person as administrator, and shall conceive himself in danger of becoming liable by reason thereof, it shall be lawful for the county court, wherein said person so became bound, upon petition of the party, supported by oath or affidavit, forthwith to order a summons to issue against the party or parties with and for whom the petitioner or petitioners stand bound, returnable to the next term of the court, and thereupon to compel such party or parties, to give other sufficient or counter security, to be approved of by said court, to deliver up the said estate to the said petitioner, or to such other person as the court shall direct, or they may and are hereby authorised and empowered to make such other order or rule thereon for the relief of the petitioners, and better securing of the estate, as to them shall seem just and equitable." Now what is the legal construction of this section? We have seen that the act of 1715, requires bond with sufficient security to be taken from an administrator. [This is done; a security or securities become apprehensive of loss by means of their liability, and they petition the county court for relief, under the act of 1813; what relief can be given? just so much as is prescribed by the statute and no more; which is the power under which the court is acting, and that is, as we think,

1st. If other good and sufficient securities approved of by the court, are given by the administrator, the bond of the first may be cancelled, and they discharged from any liability thereon.

2nd. If other sufficient securities are not given, then the court may take the estate out of the hands of the administrator, and place it in the hands of the petitioner or petitioners, or such other person as the court may direct; the consequence of which is, that in as much as security will have to be given by the person or persons into whose hands it is placed, for the performance of their duty, the original sureties will be discharged from any subsequent liability, but will be held responsible for all misbehaviour of the administrator covered by the bond, previous to the divestiture of the court.

3d. If neither of these things are done, and any other order or rule can be taken for the relief of the petitioner, and the better security of the estate, it may be, and when done, it will avail the se-

[Harwell vs. Worsham.]

curities, *quantum valeat*, but no more. The court in this case, has done neither of the things warranted by the statute; but have undertaken to release two of the securities of the administrator, and to hold the balance responsible. This they had no power to do. The consequence is, that all the securities to the bond are liable for its execution, that the judgment of the court below discharging the two, is erroneous, and must be reversed, and the case remanded for a new trial.

HARWELL vs. WORSHAM.

1. Where a constable or sheriff having an execution in his hands, pays the execution creditor without any contract for the purchase of the debt, it is an absolute discharge of the execution; and such constable or sheriff has no power to enforce the execution for his own benefit.

2. Where a constable had executions in his hands against a defendant, and had against said defendant a debt of his own, not in execution, and obtained a slave for sale without directions as to the application of the proceeds: Held, that he was bound to appropriate the monies raised by sale of the slave to the satisfaction of the executions in his hands.

Worsham recovered a judgment before a justice of the peace in Giles county, against Parish; Harwell stayed the judgment. An execution issued at the expiration of the stay.

Harwell, on the 23d day of April, 1840, obtained from two justices of the peace an order for writs of *certiorari* and *supersedeas*, on the ground that the execution was satisfied and discharged. The writs were issued, and the cause was transferred to the circuit court of Giles county.

At the June term, 1841, it was submitted to a jury, Dillahunt, judge, presiding, and a verdict rendered in favor of the plaintiff, Worsham, and judgment rendered accordingly. The defendant, Harwell, appealed.

The facts of the case are stated in the opinion of the court.

Goode, Jones and Leatherman, for the plaintiff in error, cited, 7 John. 426: 15 John. 444: 7 John. 159: 12 John. 207.

Wright, for the defendant in error. The cases of *Reed vs. Pruyn & Staats*, 7 John. Rep. 426: *Hoyt vs. Hudson*, 12 John.

[Harwell vs. Worsham.]

Rep. 207, and *Sherman vs. Boyce*, 15 John. Rep. 443, are not like this. In all these cases, the officer and debtor made contracts relative to the execution, which were regarded as oppressive to the latter, and *undertook himself to execute the process for his own benefit*. Here there is no communication between the officer and the debtor; no contract, no oppression, or usury, in reference to the debt; but Bridges simply pays the creditor, or in effect purchases the judgment of him, and places the execution in the hands of a *disinterested constable* for execution. If this cannot be done, it is not perceived why it may not. The case in 7 John. Rep., was the case of an *actual payment* by the debtor, by giving his note with oppressive and usurious interest to the officer, and the court said he must look to his contract. And it is certainly true, as in Noy, 107, and 1 Lutw. 589, there cited, that an officer cannot detain the goods of the debtor and pay the debt with his own money, for the same reason, that he cannot deliver them to the creditor in payment, the debtor being *entitled to a sale of them*. But cannot the officer in such a case sell the goods? And if sell, why not levy? Martin on the office and duty of sheriff, 62. The case in 12 John. turned wholly upon the *effect of the levy and the conduct of the officer* in failing to take care of the property levied on. Wherefore the court said the levy was a satisfaction of the debt.

In the case in 15 John., the debtor actually borrowed the money of one Barney to pay the debt, the officer becoming his security therefor, so that the money *did not belong to the officer but the debtor*. The court even in that case say, "It was not a conditional payment, nor advance of money by the deputy sheriff to the creditor."

Shall we say there is no case, where the creditor receives his money from the officer, that the execution can be enforced against the debtor? Cannot an officer, as well as a stranger, purchase a judgment in his own hands for collection? How will it be in all the variety of cases, where the officer, from indulgence to the debtor, becomes legally bound to pay, and does pay, the creditor? As for instance, escapes, failures to execute and return process, &c.? Are we to say the debt is paid, because the officer, out of his own money, has paid it? A debtor may be retaken after an escape, though the officer is bound for the debt. 3 Comyn's Dig. (Title Escape E.) 582. And can he not be, even, if the officer in such a case, pay the plaintiff the debt?

Whether the officer really paid the debt out of his own money,

[Harwell vs. Worsham.]

or from the effects of Parrish, were questions of fact for the jury, and being fairly submitted to them, the court will not now disturb the verdict.

There are many cases, where the creditor has received his money, and yet the execution is allowed to be run and payment enforced from the real debtor. Instance the case where the stayor pays the judgment, and yet is permitted to enforce payment on the *very same judgment* from the principal debtor. 2 Yerger's Report, 544.

Also, where the surety pays, and enforces the same execution for his re-imbursement. The case of *Gunn & Boyd vs. Tannehill*, 2 Yerg. 544, seems to me, not to differ in principle from this.

GREEN, J. delivered the opinion of the court.

Worsham having recovered judgment before a justice of the peace against R. D. Parrish, the plaintiff in error became security for the stay of execution. After the expiration of the time allowed for the stay, an execution issued against Parrish and Harwell, and came to the hands of Bridges, the constable, who had in his hands other executions against Parrish. At the same time Parrish was indebted to the constable, Bridges, in the sum of about four hundred dollars, which Bridges had loaned him, and for which he held his notes, upon which he was to pay twenty-five per cent interest. Things being in this situation, Parrish delivered to the constable, Bridges, a negro boy, slave, to be sold, without giving any instruction as to the application of the proceeds of the sale.

The slave was sold for seven hundred dollars, a sum more than sufficient to have satisfied all the executions against Parrish in the hands of Bridges. The constable, Bridges, paid Worsham, the plaintiff below, the entire amount of his execution, without reservation or condition, and without any contract of any sort with the plaintiff, but he did not credit the execution, or return it satisfied, but held it still in his hands. Parrish has become insolvent, and the execution aforesaid is sought to be enforced against Harwell, the security for the stay, on the ground, that Bridges applied part of the money arising from the sale of the slave, to the extinguishment of his own debt against Parrish, and that the remaining portion of the price of the slave was insufficient to satisfy the executions in his hands.

The court told the jury, that "a constable could advance money

[Harwell vs. Worsham.]

to the plaintiff in an execution, and pay off the execution, and then enforce the collection of the execution in the name of the plaintiff therein, for his own use, benefit and indemnity," but, "that such constable could not be his own officer, but that it was competent to place the execution in the hands of another constable to enforce it for his benefit."

The court further charged the jury, "that if the constable, Bridges, had executions in his hands against Robinson D. Parrish, and also private notes of his own on him, and received the negro boy Jacob from Parrish for sale, without any directions from him as to the application of the money he should get from such sale, then it would be competent for him to apply the money to the payment of his own private and individual claims or notes, to the exclusion of such executions."

1. Can a constable or sheriff, after he has paid off an execution to the plaintiff, hold it up as unsatisfied, and enforce the collection of the money upon that execution for his own benefit?

We think most clearly, he cannot. When the judgment creditor is paid and satisfied, the object, for which the execution was issued, has been attained, and the force of the writ is spent. The process being thus *functus officio*, the power which was conferred upon the officer by it, is gone. If upon a subject so plain, authority were wanting, the cases of *Reed vs. Pruyn & Staats*, 7 Johns. Rep. 426, and *Sherman vs. Boyce*, 15 Johns. Rep. 444, are full upon the point. In the latter case, the debtor and the deputy sheriff executed their joint note to one *Barney*, from whom the money was borrowed, and the officer paid it to the plaintiff in the execution; the debtor *agreeing* that the execution should still be held in the hands of the deputy sheriff for his security, and that if Barney should call on him for the money, the sheriff might sell under the execution.

When the sheriff paid the money to the plaintiff, he informed him that the execution was not intended to be discharged, and his receipt was taken for the money on a separate piece of paper. The court said, it was not a conditional agreement, nor advance of money by the deputy sheriff to the creditor; "the *debt* must, therefore, be deemed satisfied as to the judgment creditor; and that fact being established, the law, founded on wise policy, considers the execution as *functus officio*."

So in the case before the court, the debt was *satisfied*. There was no

[Harwell vs. Worsham.]

condition in the payment of the creditor ; no contract with him for the purchase of the debt, and advance of money, on his assignment, verbal or written, of the beneficial interest in the judgment and execution against the debtor. Being thus satisfied, no matter by whom, the execution ceased to have any force, or give the officer any power to act.

In the case of *Weller vs. Weedale*, Noy, 107, it was decided, that if a sheriff satisfy a debt out of his own money, he cannot afterwards detain the goods of the debtor, on the *fi. fa.*, for his own indemnity. Nor can the question, whether the debtor requested the officer to satisfy the execution, or it was done of his own accord, without the knowledge of the debtor, make any difference.

The 2nd question is, whether the constable had a right to retain part of the price of the slave, in satisfaction of his own debt due by note, in exclusion of the executions he had in his hands?

We do not say, that an individual, against whom an officer may have an execution, may not pay a private debt due the officer, by stipulating at the time he gives the money, that it is to be received in discharge of such private debt.

But a sheriff or constable is required to use active diligence in the execution of process which may come to his hands. He must, if the defendant have property, levy the execution, or show some reasonable excuse why he did not. And if property be placed in his hands for sale, without directions about its application, he is bound to apply it to the execution, although he may have a private claim against the debtor.

So, if money be paid to an officer, who has executions against the party, and also a private debt, it must be applied to the executions in preference to the private debt; because the execution creditors have placed in the officer's hands the means of coercing payment of their claims, and the presumption would be, that the money or property was *intended* by the debtor for the satisfaction of the claims that were thus pressing him; and because the officer is bound to use *active* diligence in the execution of process, a diligence exceeding that which a man employs in his own affairs. If a private man, without reward, were to undertake to collect a note for a friend, and he had a claim against the same debtor, and money were paid him without direction, he might apply it to his own or his friend's debt. But even in that case, it would hardly be thought

[Martin vs. Kirk, et al.]

fair, if his own debt were extinguished, and his friend's entirely excluded. But how different is the case before the court. The constable, by reason of these executions, obtained property without directions as to its application, and having sold it, applied the proceeds to the payment of a debt for money borrowed of him at twenty-five per cent interest, and the execution creditors are wholly excluded.

If this were tolerated by the court, it is easy to see that it would invite the constables to adopt a system of fraud upon execution creditors, and oppression upon debtors, that would tend to subvert the foundations of private right, and of civil liberty.

Therefore, upon grounds of public policy, if no other principle were in the way, such a procedure could not be tolerated.

Upon both points here noticed, the court erred, and, therefore, the judgment is reversed.

MARTIN vs. KIRK, et als.

1. The power of a partner to bind his co-partner ceases on the dissolution of the firm.

2. After the dissolution of a partnership, no individual of the dissolved firm has a right to bind another member by endorsing the firm name, though it be for the purpose of renewing the existing notes of the dissolved firm.

3. When a firm is dissolved, each member of the dissolved firm, if his power be not restricted by the terms of the article of dissolution, may acknowledge in the name of the firm all just accounts, not barred by the statute of limitations, sign and receive receipts for monies received and paid in the name of the firm, and the firm will be bound thereby.

4. Where the members of a dissolved firm, in the publication of notice of their dissolution, used the following language, "Either of the parties are authorised to use the name of the firm in liquidation, only, of past business:" Held, that this did not authorise the parties to renew a note given by the firm for a partnership debt, nor confer upon any of the parties powers which they did not possess by law.

Fogg and Washington, for Martin.

Houston, Brown and Meigs, for the defendants in error.

TURLEY, J. delivered the opinion of the court.

This is an action of assumpsit, brought by the plaintiff in error,

[Martin vs. Kirk, et als.]

against the defendants, as endorsers of a promissory note, under the following circumstances: Defendants were partners, trading under the firm and style of Chaffin, Kirk & Co., at Columbia and Pulaski, Tennessee, and Yerger, Chaffin & Co., New Orleans. This partnership was dissolved, and publication thereof duly made as follows:

“Dissolution. The houses of Yerger, Chaffin & Co., New Orleans, and Chaffin, Kirk & Co., Columbia and Pulaski, are this day dissolved by mutual consent; either of the parties are authorised to use the name of the firm in liquidation, only, of the past business.”

After this dissolution, the note which forms the basis of this transaction, was endorsed in the name of the firm, to the plaintiff in error.

John M. Bell and John K. Yerger, two members of the firm, plead non-assumpsit. John Kirk, Ed. H. Chaffin and A. Van Wyck, the others, in addition thereto, further plead, that the endorsement upon which they are sought to be charged, is not their act and deed. Upon the trial, the jury found a verdict in favor of the plaintiff against John M. Bell and John K. Yerger, and against him in favor of J. Kirk, E. H. Chaffin and A. Van Wyck, and judgment given accordingly; to reverse which this record is filed under the provisions of the act of assembly, and the opinion of the court asked thereon.

It is to be observed, that the bill of exceptions does not contain the facts of the case; the verdict and judgment are, therefore, conclusive upon the rights of the parties, unless there be error in the charge of the judge, upon some question of law arising in the case. This, it is said, there is, in this: the court was requested to charge the jury, that the sentence in the articles of dissolution, that “each of the parties is authorised to use the name of the firm in liquidation, *only*, of the past business,” without more evidence, authorised any member of the firm to use the name of the firm in drawing or endorsing notes or bills, in renewal of past notes or bills drawn or endorsed by the firm, which the court refused to do, but on the contrary, charged, that this clause in the articles of dissolution did not of itself confer the power on any of the partners to bind the firm on notes or bills made or endorsed for renewal of former liabilities; that the word liquidation was not technical, but still had a definite meaning; that it meant the act of settling and adjusting accounts;

[*Martin vs. Kirk, et als.*]

in other words, to liquidate mercantile business, signified to receive and pay.

It would be found difficult, we apprehend, even if this charge were erroneous, to reverse, therefore, as this case stands.

This record does not show, whether the debt for which this endorsement was made, was a debt precedent or subsequent to the dissolution of the partnership, and when the bill of exceptions does not contain the proof, facts will be intended in favor of a verdict. But in as much as this case has been argued on both sides, as if it appeared, that the endorsement was made in renewal of a precedent liability, we will so consider it, and upon that point alone determine it.

It is not denied by the plaintiff in error, that as a general proposition, the power which one partner has to bind his co-partner by a new contract, ceases on the dissolution of the firm; but it is contended, that this case does not fall within the proposition, because of the power given in the terms of the dissolution to each member of the firm to use the name of the firm in liquidation of the past business. The whole argument then rests upon the word "liquidation;" this is a subject difficult to reason about; it has been correctly said, that it is not a technical term, and, therefore, can have no legal meaning; it is not shown to be a commercial phrase, giving by the custom of merchants greater latitude of power to the members of a dissolved firm, than they would have had without it, in the settlement of the business of the firm, and we, therefore, cannot say, that it has a commercial meaning, different from that which it has in common parlance. What, then, is the common parlance meaning of the word liquidation? It appears to be a word of French origin, and is, in the Dictionary of the French Academy, said to be "a term of jurisprudence, of finance and of commerce; the action by which one determines, or fixes that, which has been indeterminate in every species of accounts; liquidation of expenses, of interest, of accounts; liquidation of profits, liquidation and partition of a succession. He labors for a liquidation of his debts, of his effects, of his accounts." Webster defines the word liquidate, "to pay, settle, adjust and satisfy."

From this meaning of the word, as established by these high French and American authorities, it would appear manifest, that the words liquidate and liquidation, when applied to a bill, bond or note, or bill of exchange, means a payment and satisfaction thereof,

[Martin vs. Kirk, et als.]

there being nothing else to liquidate, there being nothing else indeterminate, the amount due, and the date of payment, being already fixed by contract. When applied to open accounts, they mean a settlement and adjustment of the accounts, by which the amount due is to be ascertained by mutual examination by the parties interested.

If this meaning be correct, as we think it is, what power is given to the different members of the firm of Chaffin, Kirk & Co., and Yerger, Chaffin & Co., to bind each other, by the use of the name of the firm in liquidation, only, of past business? Clearly, no more than to sign the name of the firm to an acknowledgment of an unsettled account, which upon examination may be found to be against them, to give receipts for money paid for debts due to the firm, and to take receipts for money paid by it.

But it is said, if this is all, then the word "liquidation" hath no effect whatever, for this they would have had the power by law to do, unless restricted by the terms of the dissolution. So we think. When a firm is dissolved, each member of the firm may be actively employed in the settlement of its affairs, and as such, may acknowledge in the name of the firm, all just accounts, not barred by the statute of limitations, sign and receive receipts for monies received and paid in the name of the firm, and the firm shall be bound thereby, unless by the terms of the dissolution, properly made known, that power is restricted to a portion of the firm, to the exclusion of the rest, and the use of the word liquidation, neither extends nor limits this power. This, we think, is the fair conclusion from the meaning of the word liquidation.

Let us now see, whether the authorities, instead of conflicting with this view of the case, does not sustain it?

In Chitty's treatise on Contracts, page 81, it is said, "After the dissolution of a firm, and due notice thereof given, when necessary, it is not in the power of one of the parties who composed the firm, to bind the other by putting the partnership name on any negotiable security, even though it existed before the dissolution, or was for the purpose of liquidating the partnership debts, and the party signing was authorised to settle the partnership affairs." 3d Esp. R. 108: 1st Camp. 281, 10th East, 418. To the same effect is Chitty on Bills, 61.

In Watson on Partnership, page 209, it is said: "The power of one partner to bind the firm by a negotiable security, ceases with

[Martin vs. Kirk, et al.]

the existence of the partnership. The partnership being dissolved, even a power to receive and pay all debts due to and from the partnership, will not authorise one of the late partners to endorse a bill of exchange in the name of the partnership, though drawn by him in that name, and accepted by a debtor of the partnership, after dissolution."

In the case of *McPherson vs. L. Rathbone and others*, reported in 11th Wend. 96, the supreme court of New York says, "though one partner cannot bind his co-partner by note after the dissolution; yet he may liquidate a previous account."

These authorities, we think, fully sustain the position, that the word "liquidation" confers no greater power, than the different members of the firm would have had without it, and that it does not extend to the renewal of negotiable securities. We see, that Mr. Chitty uses the word as synonymous with payment, where it is applied to liquidated debts, and that he denies the power of one member of a dissolved firm, to bind the other by a negotiable security, though given in liquidation of an unsettled account, he being authorised to settle the partnership affairs.

The supreme court of New York uses it as synonymous with the term, settlement, or adjustment of an unsettled account.

To hold that the word "liquidation" gives a greater power than the words "to settle the partnership affairs,"* or the words "to receive and pay all debts due to and from the partnership," would, we think, not only be at war with philology, but with a sound practical exposition of the law.

When partnerships are dissolved, it is not only for the interest of parties, but the harmony of society, that the business should be settled as soon as possible. How can that be done, if any one of the firm may at his pleasure, without the knowledge and consent of the others, renew the negotiable securities at his pleasure? They may in this way be kept alive for years, and persons utterly ruined long after they had supposed themselves discharged from all liabilities. The power is a dangerous one, and we will never raise it by implication: it must be expressly given, if it is expected to be enforced; this the word liquidation does not do.

We are, therefore, of opinion, that there is no error in the judgment of the court below, and affirm the same.

* See Jefferson's Works, vol. 1, p. 348.

NAPIER vs. CATRON, et als.

1. One partner has no power to bind his co-partner by deed, unless he be expressly empowered to do so by deed, and that power cannot be proved by parol.

2. A power to bind a co-partner by deed is not a stipulation of the partnership, though such power be inserted in the articles of partnership. It simply authorizes the use of each other's name in a mode and to an extent not authorised by the laws of partnership.

3. Where partners authorised each other by a clause in the deed of partnership to bind each by deed, and the partnership expired by its own limitation, and thereupon, by written agreement it was continued for the purpose of winding up the business: Held, that such continuation did not carry with it the power to bind by deed, and that a mortgage on the real estate, executed by one of the firm for the purpose of securing a partnership liability, did not bind the other member of the firm.

This bill was filed in the chancery court at Franklin, by E. W. Napier, against John Catron, F. Catron and G. F. Napier, for the purpose of obtaining a decree for the sale of certain real estate mortgaged to him. J. Catron was the original owner of the real estate, and sold and conveyed to F. Catron and G. F. Napier; partners, reserving a lien for the payment of the purchase money. G. F. Napier mortgaged the property to E. W. Napier, to save him harmless against certain liabilities which E. W. Napier subsequently paid. This mortgage was made in the name of Napier & Catron, and was also signed by John Catron, in which he relinquished his lien.

The defendants answered. John Catron urged that his release of his lien was obtained by fraud; and that the mortgage was void as to F. Catron. F. Catron denied the authority of G. F. Napier to execute the mortgage as to him; the facts in reference to which, are stated in the opinion of the court.

The case was heard before Bramlett, chancellor, at the May term, 1840. He declared the mortgage void as to F. Catron's interest in the premises, and valid as to G. F. Napier's, and ordered it to be sold for the satisfaction of complainant's debt. Complainant appealed.

Cook, for the complainant.

Meigs, for the defendants, J. and F. Catron, cited the following authorities, to wit, Collyer, 256 : 5 Peters, 561 : Story on Agen-

[Napier vs. Catron, et al.]

cy, sec. 37, 124, 125: 3 Kent, 47: 1 Yerger, 26, 30: 1 Humphreys, 113.

TURLEY, J. delivered the opinion of the court.

The facts of this case are as follows: In the year 1833, John Catron, one of the defendants, sold to Felix Catron and G. F. Napier, his iron works, in Lawrence county, for \$18,000, reserving a lien thereon for the purchase money.

Felix Catron and George F. Napier, on the 2d day of August, 1834, entered into partnership for carrying on the iron business at said works, for the term of three years and eleven months, which expired by lapse of time on the 2d day of July, 1838. By the provisions of the articles of partnership, under seal, the parties were mutually authorised to make contracts for the interest of the partnership, either with or without seal. At the expiration of the partnership, the firm was indebted to the Union Bank of Tennessee, the sum of \$6,828, for which John Catron was responsible as endorser. On the 17th of July, 1838, John Catron being desirous of being released as endorser, procured Elias W. Napier, the complainant, to substitute himself in his stead, by agreeing to release the lien he had for the purchase money, upon the iron works, so that Felix Catron and George F. Napier might be enabled to secure him against loss as their endorser, by a deed of trust upon the property. This was done; Catron released his lien, and a deed of trust was executed by George F. Napier, in the name of the firm, on the 17th July, 1838, to E. W. Napier, for the purpose specified.

The paper thus endorsed by E. W. Napier, was dishonored and taken up by him, and this bill is now filed, to subject the property to the payment of the debt. This is resisted as to half of the estate, upon the ground, that G. F. Napier had no legal power to convey it, it being the property of his co-partner. The proof in the case shows, that on the 6th of July, 1838, four days after the expiration of the partnership, the partners agreed in writing, that for the purpose of winding up the business of Catron & Napier, their partnership should be continued, which agreement is lost. And it is now argued for the complainant, that in as much, as by the original articles of partnership, the partners were authorised to make contracts for the benefit of the firm, either with or without seal; and in as much as this partnership was continued for particular purposes, by the agreement of the 6th July, 1838, all the stipulations

[Napier vs. Catron, et al.]

and powers of the original articles were continued; and, therefore, that George F. Napier had authority to convey in the name of the firm, the whole estate. This argument is ingenious, but not satisfactory. For without stopping to enquire, whether the power in the articles of partnership, to make contracts for the benefit of the firm, either with or without seal, would authorise one of the firm to convey lands bought before the formation of the partnership, and held as tenants in common, we unhesitatingly say, that such a power expires with the partnership, and cannot be renewed by implication, but only by express authority.

It has been invariably held, in fact it is not denied, that one partner has no power to bind his co-partner by deed, unless he be expressly empowered to do so by deed, (1st Yerg. 26, 31: 1st Humphreys, 113,) and that this power cannot be proven by parol. This power may be given in the articles of partnership, by separate deed, or by a power of attorney, but it is still a power, and not a stipulation of the partnership. Had the power, in the present case, been by separate deed, we apprehend, it would not have been insisted on, that a continuation of the partnership continued the power. We cannot see, that its being in the articles, can make any difference; it has nothing to do with the contract of partnership, but is merely intended, as a mutual warrant of the use of each other's name, in a way not recognized by the laws of partnership, without such warrant. Suppose this warrant given by the articles to a third person, would a renewal of the partnership have continued it? Surely not. But we are referred to a case from 17th Sergeant & Rawl. 165, *Miflin vs. Smith*. Of that case, we have to say,

1st. If it were as loosely considered, as it is reported, it would be of but little authority.

But 2nd. We do not think it interferes with the position assumed in this case. It holds, that though a partnership may terminate by lapse of time, yet it may be continued by express or tacit consent, and in such a case, the stipulations and restrictions of the original articles, would be considered as those of the continuing partnership.

It is seen, that we hold the power of one partner to bind another by deed, is neither a stipulation nor a restriction of the partnership.

The result of this view of the case, is, that the complainant is entitled to have one-half of the premises sold for the payment of his

[Polk vs. Ralston.]

debt, that having acquired no right by the deed of trust to the legal estate of the half owned by Felix Catron, he has no power to enquire whether John Catron has any equity thereon, for the payment of his purchase money.

Let the decree of the chancellor be affirmed.

POLK, Gov. vs. RALSTON, Adm'r.

Persons of foreign birth resident in the State of Tennessee, but not naturalised, have capacity to inherit personal estate in Tennessee, the term "alien," in the act of 1809, ch. 53, being intended by the legislature to mean foreigners by residence as well as birth.

James Read, senior, died in the county of Sumner, in 1838, possessed of personal estate, and at the September term of the county court of that county, Ralston was appointed administrator of his estate. He gave bond payable to Newton Cannon, governor of the State, and his successors in office, in the penalty of \$17,500.

An action of debt was instituted on this bond on the 26th day of September, 1840, in the circuit court of Sumner county, in the name of Polk, successor of Cannon, for the use of Hutchison, administrator of James Read, junior, deceased; Hutchison claiming as distributee, in right of his intestate James Read, junior.

The breach assigned in the declaration is, that there is a large sum of money, to wit, the sum of twenty-five hundred dollars, in the hands of said Ralston, as administrator, due and owing to the said Hutchison, administrator of the said James Read, jr. deceased, he being a distributee of the said James Read, the elder, and which the said Ralston has failed and refused to pay over to the said administrator, Hutchison.

The plea is, that the said James Read, jr. deceased, the intestate of the said Hutchison, at the time of his death was an alien, having been born out of the allegiance of the State of Tennessee, and of the U. S. of America, and within the allegiance of the King of Great Britain and Ireland, and that the said James Read, jr. deceased, had not become a citizen of the U. S. in conformity with laws of naturalization prescribed by the Congress of the U. S.; nor had the said James Read, jr. deceased, at the time of his death, fil-

[Polk vs. Ralston.]

ed his *declaration* to become a citizen of the U. S. as required by the acts of Congress, and that the said James Read, jr. deceased, at the time of his death was not entitled to any part of the personal estate of defendant's intestate, nor is the administrator of the said James Read, jr. entitled to any portion of the estate, but that the same has descended and is due to William Edmiston and others, native and naturalized citizens of the U. S. next of kin to defendant's intestate.

To this there is a replication, that the said James Read, jr. deceased, was next of kin to the said decedent, and was one of the distributees of the said decedent under the acts of assembly; that the said James Read, jr. moved to the U. S. and settled himself here in 1821, *bona fide*, with the intention of becoming a citizen of the U. S., to wit, in the county of Sumner, and was a resident of the U. S. from the period aforesaid up to his death, and that at the period of the death of the said James Read, sr., deceased, he the said James Read, jr., deceased, was a resident of the United States.

To this replication there is a demurrer and joinder in demurrer. The cause came on for argument at the June term, 1841. The circuit judge sustained the defendant's demurrer to the plaintiff's replication and gave judgment in favor of the defendant. The plaintiff appealed in error.

Cook, for the plaintiff in error.

John J. White, for defendant in error. This is a question which depends altogether upon the construction which is to be placed upon our acts of assembly in regard to aliens. The first clause of the first section of the act of 1809, (N. & C. 87,) is in these words: "in all cases where any person within this state shall die intestate, without issue, and possessed of any estate, real or personal, the said estate and every part thereof, shall descend to such person or persons who are next of kin to the said decedent, and resident within the U. S. to the perpetual exclusion of aliens, who may be related to the said decedent in a nearer degree." An alien is a term well understood by lawyers and judges; it is a term used in contradistinction to that of native or naturalized citizens. In 1st Black. 366, aliens are said to be those who are born out of the dominions or the allegiance of the crown of England. Chancellor Kent, in his second Com. 50, (4th Edition,) says that "an alien is a

[Polk vs. Ralston.]

person born out of the jurisdiction of the U. S.," with some exceptions which it is not important for the argument to consider. In 4th John. 79, it is laid down that "he must be regarded as an alien, who has emigrated to this country, after the declaration of independence." But at all events, those who have emigrated to this country since the treaty of 1783 between Great Britain and the U. S. will be regarded as aliens. 2nd Kent's Com. 69, recognized in 10th Yer. 406.

The meaning of this clause of the act then is, that it shall descend to such persons resident in the U. States next of kin, whether native or naturalized citizens, in preference to others even nearer who are aliens. If this were not the true construction of the act of 1809, any person who had merely come into the U. States upon business, not intending to remain, but still was for the time a resident of the U. S., might inherit real estate. This could not have been the meaning of the act as is evident from the preamble. It did not intend "to allow British subjects to inherit estates within this State, when American citizens are not allowed the same right of inheritance within the dominions of the British King." What, then, is the principle of the English law? It is, that "an alien cannot acquire a title to real property by descent, or created by other mere operation of law. This is a well settled rule of the common law." 2nd Kent, 53: Calvin's case, 7th Coke, 25: 1st Vent. Rep. 417: 3 John. Ca. 109, 121: 4th Wheaton, 461: 7 do. 535: 2nd Black. 268. It cannot be, then, that under this clause of the act of 1809, an alien was to inherit, who might happen to be a resident of the U. S. as against native or naturalized citizens.

This view of it is irresistibly strengthened by the second section of the act which says, "where any alien has acquired a right of succession," &c., "he shall be forever barred," unless in twelve months thereafter he becomes a naturalized citizen; if he does not, it shall descend "to such person next of kin who are resident in the U. S. to the perpetual exclusion of aliens." The term *resident* in this section evidently means *native or naturalized citizens*, who are resident; it must be presumed therefore that it has the same meaning in the preceding section.

The act of 1819 is to the same effect; the proviso requires the alien who has come to the U. S. and settled in Tennessee to become a naturalized citizen, or he shall derive no benefit from the act. I might refer here likewise to the act of 1838, page 266, which is

[Polk vs. Ralston.]

conceived in a more liberal spirit, although it has nothing to do particularly with this question, yet it will be seen that it requires the alien to be not only a *bona fide* resident of the U. S. but also to have filed his declaration to become a citizen before the death of the ancestor, in order to have the benefit of its provisions.

If it is said there is a difference between the descent of personal and real estate, the answer is, that the act of 1809 makes no such distinction. It speaks of both real and personal estate, and that the said estate and every part thereof shall descend, &c. And when the words are plain and clear, the legislature must be intended to mean what they have plainly expressed, and consequently no room is left for construction. 6th Bacon, 380: 2nd Cranch, 386, 399. It is true, the preamble only speaks of American citizens being debarred the right of succession to real estate in England, as the cause of its enactment. But that will not control or restrain the enacting part of the statute, where it is expressed in clear and unambiguous language, as is the case here. 6th Bacon, 381: 8th Mod. 144: 6th Mod. 62.

Now it may be, that under the second clause of the first section of the act of 1809, the estate of the decedent would not descend to the trustees of the academy, where he left relations within the U. S., although they might not have been naturalized. That, however, has nothing to do with this case, which is one that arises under the first clause of the section, and involves the question between native and naturalized citizens and aliens. There might be a very good reason, why the legislature would be willing that the property of the deceased, should go to any of his relations within the U. S. although not naturalized, before it should be claimed as escheated property; and yet when the question was between native and naturalized citizens and aliens, they should direct the estate to descend to the former.

If the case in 10th Yerg. 406, of *Moore vs. Wilson's Administrators*, is relied on, it is sufficient to say, that that case was decided upon the ground, that complainant was not an alien, having come to the U. S. before the treaty of peace of 1783. That was an end of the case, and it was not necessary to have decided anything more. The court, to be sure, go on to say, "that by the provisions of the act of 1809, she could claim as heir of the deceased, whatever may have been her condition with respect to allegiance and citizenship." Under what clause or what section of the act of

[Polk vs. Ralston.]

1809 she would have been entitled, it is not said. There may have been something in the peculiar facts of that case, (for there is but little of the proof reported,) that would have entitled her to a portion of the estate, under the same clause of the act of 1809; but this cannot be regarded, I apprehend, as a decision upon this statute in reference to the facts of this case, and the parties now before the court.

REESE, J. delivered the opinion of the court.

The question in this cause involves the construction of the act of 1809, ch. 53. The preamble to the act reads, that "whereas American citizens are debarred the right of succession to any real estate, which might descend to them by the death of relations in the kingdom of Great Britain, and whereas it is inconsistent with the protection which this State owes to its citizens to allow British subjects to inherit estates within this State, when American citizens are not allowed the same right of inheritance within the dominions of the British King. Wherefore," &c. Upon this preamble, it is obvious to remark, that the assumption which it contains is erroneous, for the subjects and citizens, respectively of the two countries indicated, at that time, bore towards each other, as to questions of succession and inheritance, the precise reciprocal relations which are intimated as being proper, being alike entitled to succession in personal, and alike barred from inheritance in real property. The first section of the act contains the following provisions: "In all cases where any person, within this State, shall die intestate, without issue, and possessed of any estate, real or personal, the said estate and every part thereof shall descend to such person or persons who are next of kin to the said decedent, and residents within the United States, to the perpetual exclusion of aliens, who may be related to the decedent in a nearer degree."

In what sense is the term "alien" here used? Is it intended to include persons of foreign birth, not naturalized, although "resident," and having their domicil within the U. States? or is it intended to apply to foreigners only, as well by residence as birth? In favor of the former sense, it may be remarked, that it is more consistent with the scope of the preamble, the "protection" therein mentioned, being intended in favor of those who owe allegiance to our laws and institutions, and against the foreign subjects of

[Polk vs. Rabston.]

Great Britain. Moreover, the estate is to descend to the next of kin of the decedent, resident within the U. S., in contradistinction to aliens, who are excluded indeed, throughout this statute, in every instance. The persons to take are described as residents merely within the United States, not as citizens or American citizens, terms used in the preamble only.

The framers of the law seem to have been studious, except in the inartificial use of the term "alien," to exclude, throughout the statute, the use of words that might interfere with our denizen population. So to have interfered, would have been in express conflict with the liberal feeling uniformly acted on by the American States towards that class: a policy expressly announced by our own legislature, as having been permanently that of the United States, in their preamble to the act of 1819, ch. 36. The next clause, in section 1st, to that above extracted, is as follows: "And in all cases where any person dying as aforesaid, shall have no relations within the U. States," "then the county academy shall take," &c. The first clause gives the estate to the next of kin of the decedent, "resident within the U. States," excluding aliens, to wit, foreign residents. The second clause gives it to the county academy, when the person dying has no relations within the United States. "Residents within the U. S.," "relatives within the U. S." are the terms selected, and not citizens, or American citizens, as descriptive of the next of kin, and are used in contradistinction to the term "alien."

If it were necessary to pursue the second section, it would be found still more strikingly to exhibit this contradistinguished use of the terms, resident and alien, so as to make it manifest, that the legislature did not intend to take the estate from, but on the contrary to give it to, a resident relation, although of foreign birth, domiciled among us at the time of the death.

Another consideration may be suggested, that it is not proper to amplify by construction, a statute which upon its face shows that its framers were mistaken as to the existing state of the law, especially, where such amplified construction makes it conflict still more with the liberal spirit of the American States on this subject.

We are of opinion, therefore, that the judgment of the circuit court must be reversed, and the case be remanded, in order that the jury may enquire into the damages.

ELKINS *vs.* THE STATE.

1. No length of time renders a nuisance lawful, or estops the State from abating it, and punishing the person who creates such nuisance.

2. A much shorter period will suffice to establish a right in the State to the use of the land of an individual for highway purposes, than to show that a private person has a right to the estate of which he is possessed.

3. Where the travelling public had for ten years actually ceased to use a portion of a road established by public authority, and had by user acquired a right to a portion of the land of the trustees of a church for highway purposes, instead of said portion of old road: Held, that the acquisition of a right of way over the land of the trustees did not estop the State from asserting its claim to the old road, nor shield the individual obstructing it from punishment.

This case was argued by Mr. Long for the plaintiff in error, and by the Attorney General for the State, and the following authorities cited and discussed: Woolwich on Ways, 4 Law Lib. 9: 2 Starkie, page 666: 3 Starkie, Title Prescription: 11 East, 56: 7 Wheaton, 59: Cro. Ch. 267: Roscoe, 452: 1 Russell, 274, 286: 2 Hild. Ab. of American Law of real estate, Tit. Easement: 2 Mason, 313.

REESE, J. delivered the opinion of the court.

Elkins was indicted in the circuit court for Bedford county for a nuisance, by keeping up a fence across the highway, and thereby obstructing the public in the use of it. The proof shows that many years since, a highway established by public authority passed over the ground, across which the fence in question has been built. That a meeting house, placed upon an acre of land, owned by the trustees of a church, was not far distant from the highway, and that the worshippers at the church, in going to and from it, diverged from the public highway, and thus formed a road, somewhat nearer through the church lands, upon which the general travelling public chiefly passed, for the last ten years. That about six years since, the fence in question was built across the highway by the former owner of the tract now occupied by the defendant; that since that time the public have exclusively used the new way through the church grounds. The trustees of the church were dissatisfied with this use of their land, but disliked to institute a prosecution on the subject. Defendant has been owner of the premises, of which, the fence across the highway, is a part, for four

[Elkins vs. The State.]

years, and two years since was duly notified to remove the obstruction, which he failed to do.

No change had been made in the highway by public authority. Upon this state of the case, his Honor, the circuit judge, charged the jury, that if from the length of time, the public had used the new way, and the acquiescence of the trustees of the church, taken together, they thought the new way had been dedicated to the public use, then such new way would be substituted for the old highway, and the defendant would not be guilty. The jury found the defendant guilty, and the court refused to grant a new trial. The defendant here objects to the charge of the court above stated, and insists that it was erroneous. And we think it is. But the error is in favor of, but not against the defendant.

For if, as between the public and the trustees of the church, the circumstances were such, as to amount to a dedication by the trustees to the public of a right of way over the church lands, it would by no means follow from that, that the defendant had thereby acquired a right to close up the pre-existing highway. The grounds and principles upon which such dedication would arise, would by no means operate in deprivation of the public right. In the absence of evidence to show the establishment of a highway by public authority, it is made out at common law by showing that the public have used and enjoyed it, and their actual occupation of it for a considerable space of time, without interruption, affords a strong presumption of a right to use it, and a much shorter period of possession will suffice to indicate a right in the public, than to show that a private person has a right to the estate of which he is possessed. 2 Starkie, 666. But when, by the proper action of public authority, a highway is, as here established, and used, over the lands of a citizen, and he turns aside the public, by obstruction, from its use and enjoyment, the public may, almost at once, perhaps, by force of such circumstances, have the new way dedicated to their use; but does the obstructor, thereby, and *eo instanti*, become re-invested and free from the easement of the public highway?

What length of forbearance on the part of the public, to prosecute him for the obstruction, or to abate it, will make him cease to be a wrong doer, and conclude [and estop the public from the assertion of its right? He continues to be a wrong doer, and the way obstructed continues to be a public way. Because the

[Hill vs. Crosby.]

public may use the new way, and acquire a right to the new way, they do not thereby lose the right to their old way. When the obstructor of a highway speaks of prescription on his part, or abandonment on the part of the public, he is met by the maxim, *nullum tempus occurrit*, &c. See this principle illustrated and enforced by Justice Story, in the case of the *United States vs. Hoar*, 2 Mason, 312. We are of opinion, therefore, that the verdict and judgment of the circuit court are right, and they are affirmed.

HILL vs. CROSBY's Adm'rs.

Straythorne holding notes on Brown, to which Hill was security, agreed to take new notes of Hill and Brown, payable at a later date to himself, and surrender the old notes. Hill made the notes in conformity with the agreement, and gave them to Brown for signature and delivery. They were tendered, and Straythorne refused to take them, and thereupon Brown sold them to Crosby, at a large discount, with his own endorsement thereupon: Held,

1st. That Crosby had no equitable claim on the notes against Hill, they being payable to Straythorne, and endorsed to Crosby by Brown.

2nd. That although a judgment had been rendered at law on the notes, and the defendant had failed to plead *non est factum*, chancery would relieve, the defence at law being by no means a clear and unembarrassed one.

This bill was filed in the chancery court at Columbia, and came on for final hearing at the September term, 1841, on the bill, answer, replication and proof.

Bramlett, chancellor, presiding, being of the opinion, that Brown had fraudulently transferred the notes to Crosby, under circumstances that indicated to Crosby the fraud of Brown, and that Hill had not a clear and unembarrassed defence at law against the suits instituted against him on the notes, rendered a decree for a perpetual injunction against the enforcement of the judgments.

The administrators of Crosby appealed.

Nicholson, for Hill.

Frierson, for the administrators.

[Hill vs. Crosby.]

GREEN, J. delivered the opinion of the court.

1st. The first question in this case is, whether the complainant could have made an effectual defence at law?

The bill alleges, that the notes, upon which the judgments (now sought to be enjoined) were obtained, were executed by Brown and the complainant, as his surety, to Strayhorne, in pursuance of an agreement previously made between Brown and Strayhorne, that they would be received by the latter in discharge of several notes held by him on Brown and complainant, in which complainant was Brown's surety. The notes were executed payable to Strayhorne, and delivered to Brown, the principal obligor, to be by him handed over to Strayhorne, in pursuance of the aforesaid agreement. Strayhorne refused to receive them, as he had agreed to do, and Brown fraudulently sold them to Crosby at a discount of twenty-five per cent, without any endorsement from Strayhorne. This statement of the bill is substantially proved, and upon these facts, the question arises, whether the complainant could have sustained a plea of *non est factum*? As Strayhorne had agreed with Brown to receive these notes in payment of those he already held, and the fact of this agreement was communicated to Hill, the complainant, who thereupon executed the notes, and delivered them to Brown for Strayhorne, it may well be questioned, whether he could afterwards maintain, that there was no *delivery* to Strayhorne. Although there was no express agency on the part of Brown for Strayhorne, yet, as the negotiation was conducted by him, and was to be consummated by reason of his own connection with the transaction, through his agency, the delivery of the notes to Brown for Strayhorne, very probably placed them beyond the power of the complainant to re-call, and entitled Strayhorne to the possession of them upon surrendering the old notes. If this be so, the delivery to Brown was a delivery to Strayhorne, in legal contemplation, so that the suits at law in the name of Strayhorne for the use of Crosby's administrators, could not have been successfully defended under the plea of *non est factum*.

But a court of chancery refuses to take jurisdiction in such cases, only, when there has been a trial at law, and the party has neglected to avail himself of a clear and unembarrassed defence which he might have made. In this case it cannot be affirmed that complainant's defence upon the plea of *non est factum* was clear and without

[Hill vs. Crosby.]

embarrassment. If he could not make *that* defence, as the notes were under seal, he was without remedy at law, and, therefore, the trial there, is not in the way of this court, in affording that relief which the merits of the case may demand.

2nd. The next and remaining question is, whether the complainant is entitled, upon the facts before stated, to be relieved against these judgments? And we think he is.

The notes were executed for the special purpose of being placed in the hands of Strayhorne, in payment of a debt for which the complainant was liable. Had Strayhorne taken them, and advanced money upon them to Brown, still retaining the old notes, knowing they had been executed by Hill in pursuance of his own agreement with Brown, and that Hill had entrusted them to Brown to carry out that agreement, it would be most clear that he would have been as guilty of a gross fraud in buying as Brown would have perpetrated in selling the notes. But Crosby could have been in no better situation, even had he obtained the notes from Strayhorne, without endorsement, and not in the course of trade, than Strayhorne himself, and all the equities which Hill would have had against Strayhorne would have existed against Crosby. The facts, however, make the case much stronger against Crosby than the one supposed.

Brown, the principal obligor, traded him the notes, and endorsed them. He saw they were payable to Strayhorne, and were not endorsed by him; and with all this reason to awaken suspicion, he purchased them at a heavy discount. Standing in this predicament, he has no equity to oppose that of the complainant.

Let the decree be affirmed.

CAPLINGER vs. SULLIVAN.

1. Felts bequeathed certain slaves to his wife for life, and at her death to his daughter Ann, wife of Sullivan. Sullivan having purchased the life estate, sold and delivered the slaves to Caplinger and died, leaving the tenant for life, and Ann his wife alive: Held, that on the death of the tenant for life, the slaves belonged to Ann Sullivan.

2. No assignment by the husband of reversionary choses in action, or other equitable interests of the wife, even with her consent and joining in the assignment, will exclude her right of survivorship.

This is an appeal in error from the circuit court of Smith county.

Burton, for the plaintiff in error, cited, 2 John. Ch. R. 208: 2 Story, 631: Clancy, 442: 2 Atk. 419: 10 Ves. 90: 2 Kent, 141: Clancy, 137-8-9: 1 and 2 Law Lib. 141, 143: 12 Ves. 437: 2 Atk. 550: 2 Cruise, 271: 5 John. Ch. R. 202: 3 Cowen, 590: 1 Yerg. 413: 10 Yerg. 190.

Caruthers, for defendant in error.

REESE, J. delivered the opinion of the court.

This is an action of detinue for slaves. The property in question was bequeathed by the last will and testament of Boling Felts to his wife, for life, and after her death to Ann Sullivan, the plaintiff in this suit, then the wife of William Sullivan, and the said William was appointed executor of the will. He duly took upon himself that office, and in 1819, purchased of Mary Felts, testator's widow, the property in question, for the sum of one hundred dollars per annum, to be paid to her during her life.

In 1830, Mary Felts acknowledged in writing her reception of a sum in gross, from William Sullivan, in satisfaction of her annuity. Subsequently, in the same year, William Sullivan conveyed the slaves, for a valuable consideration, to Caplinger, the defendant, and put him in possession thereof, he, himself, having been possessed of them from the time of his purchase in 1819. William Sullivan died in 1835. Mary Felts, the owner of the slaves for life, and Ann Sullivan, the wife of William, to whom they were limited in remainder, surviving. Mary Felts died in 1838.

These facts, in the circuit court, were found by the jury in a special verdict, and judgment thereon was pronounced by his honor

[Caplinger vs. Sullivan.]

the circuit judge, in favor of Ann Sullivan, the plaintiff, and the defendant, Caplinger, has appealed in error to this court.

Justice Story, in his Commentaries on Equity, paragraph 1413, states it as a principle, that "no assignment by the husband, of reversionary choses in action, or other reversionary equitable interests of the wife, even with her consent and joining in the assignment, will exclude her right of survivorship." The assignment, he adds, "is not, and cannot from the nature of the thing, amount to a reduction into possession of such reversionary interests."

The general principle thus laid down, we find to be abundantly sustained by authority, and particularly, by the leading cases on the subject, *Purdew vs. Jackson*, 1 Russ. 1, determined by Sir Thomas Plummer, Master of the Rolls, and the case of *Honner vs. Morton*, 3 Russ. 65, determined by Lord Chancellor Lyndhurst, 15th April, 1827.

The point settled in the last case, is, that where husband and wife, assign to a purchaser, for valuable consideration, a share of an ascertained fund, in which the wife has a vested interest in remainder, expectant on the death of a tenant for life, and both the wife and tenant for life, outlive the husband, the wife is entitled by right of survivorship, to claim the whole of the share of the fund, against such particular assignee for valuable consideration. The Lord Chancellor refers to the principal cases relied on, on either side, and particularly to the case before Sir Thomas Plummer, and concludes, after considering the question in all its bearings, and the authorities and principles on the one side, and on the other, that the judgment of the Master of Rolls, in *Purdew vs. Jackson*, was right, and that the husband dying while the wife's interest continued reversionary, had no power to make an assignment of property of this description, which shall be valid, against the wife surviving.

But it is urged on behalf of the defendant, in this case, that the husband did not die, while the wife's interest in the property continued reversionary; for it is said, that the reversionary character of the interest was terminated by the purchase on the part of the husband, from the tenant for life. But this, we think is not so. For if after this purchase, the husband had died, without assignment, can it be doubted, that the personal representative of the husband, would have been entitled, during the existence of the ten-

[Caplinger vs. Sullivan.]

ant for life, to the property in question, and after that, that the wife would have been entitled by survivorship?

The wife had no interest in the husband's purchase; he stood in the place of tenant for life. The tenancy for life still continued, and the reversionary interest unaffected by such purchase, could not commence in possession, till the life estate terminated. The husband possessed the slaves, but he possessed them as purchaser, not as *husband*, and his title and possession, were of, and commensurate with, the life estate, and that only. Here was no merger of estates. The life estate belonged to the husband solely, and absolutely as purchaser; the reversionary interest or remainder, to husband and wife, in right of the wife, and liable to become his absolutely by survivorship. If the husband, having assigned, had continued to live till the life time estate had terminated, then, indeed, as a court of chancery views such assignment as an agreement to assign when in his power, and considers that also as done, which ought to have been done, the assignee for a valuable consideration, would, in equity, have been entitled to the property.

We have been referred by defendant's counsel to the case of *Pinckard vs. Smith and wife*, Littell's Select Cases, 331, as bearing on this question. The court in that case, seemed to be of opinion, that a vested remainder in a slave, occurring to the wife during coverture, so far vested in the husband, as that he would be entitled to recover the same, without administration on the wife's estate. But they also state it, as their opinion, that it does not so vest, as to defeat the wife of her right by survivorship. The case, whether properly determined or not, can, therefore, be no authority bearing upon the case at the bar.

Upon the whole, we are of opinion, that the circuit court pronounced the proper judgment upon the special verdict, and we, therefore, affirm that judgment.

HENLY vs. NEAL.

Neal, the owner of a field, leased eight acres thereof to Henly, the whole being under a common enclosure, without any division fence. Neal turned his stock upon the ground possessed by himself, and they went thence to the land occupied by Henly, and consumed his crop: Held,

1st. Henly was not bound to erect a division fence, nor to aver in his declaration that Neal was bound to do so.

2nd. Neal having leased the land to Henly, had no right to prevent him from reaping the full benefit thereof, and the removing of the enclosure so as to let in his stock, was an actionable injury.

3rd. The injury being the immediate and direct consequence of the act of Neal, and the act having been wilful, trespass *vi et armis* was the appropriate and only remedy.

This action was instituted in the circuit court of Sumner county, and tried before Judge Maney, at the February term, 1841. A verdict was rendered in favor of the plaintiff, and the judgment arrested.

The plaintiff appealed in error.

Guild, for the plaintiff.

White, for the defendant.

GREEN, J. delivered the opinion of the court.

This is an action on the case. The declaration states the cause of action as follows:

"For that whereas, heretofore, to wit, the plaintiff on the 1st day of August, 1840, and previous thereto, to wit, from the 1st day of January, 1840, till the 1st day of August as aforesaid, had leased land of the defendant and was peaceably possessed thereof, and had in cultivation, to wit, in corn growing, a field of eight and one-fourth acres, lying in the county of Sumner, which eight and one-fourth acres in cultivation as aforesaid, was enclosed by a fence, which likewise enclosed an adjoining field of oats, of the defendant's, without there being any division fence between the said fields, and thereon the said Creath Neal, on the 1st day of August, 1840, without the permission, and against plaintiff's orders, turned his stock into his said field after having taken off his oats, consisting of about 100 head of hogs, thirty head of cattle, horses, &c., and then and there, the said stock of hogs, cattle and horses came from

[Henly vs. Neal.]

the said field of defendant, into the growing corn of the plaintiff, there being no cross or dividing fence between the plaintiff's corn and the defendant's stubble field, and consumed, eat up and destroyed the said field of corn of the plaintiff, of great value, to wit, of the value of \$200, which the defendant knew they would do when he turned said stock into the defendant's field; whereupon the plaintiff saith that he hath sustained damages," &c.

There was another count in the declaration, to which the defendant demurred.

The defendant pleaded not guilty, and upon this plea there was a verdict for the plaintiff, assessing his damage at \$40.

The defendant moved in arrest of judgment, which motion was sustained by the court. A *nolli prosequi* was entered as to the second count of the declaration, and the plaintiff appealed in error to this court.

The counsel for the defendant, insists that the judgment of the court below was correct.

1st. Because there is no good cause of action in the facts set out in the plaintiff's declaration.

The facts stated in the declaration are, briefly, that the plaintiff had leased from the defendant eight and one-fourth acres of ground, part of a large field, for the year 1840, which he had planted and cultivated in corn, and that the defendant had cultivated the remaining part of the field in oats; that after the oats were taken off, the defendant turned his hogs and cattle into his oats field, and there being no dividing fence between the oats and corn, the hogs and cattle passed into the plaintiff's corn, and destroyed it. This statement constitutes a good cause of action.

It was not necessary that the plaintiff should aver, that it was the duty of the defendant to build a dividing fence.

The defendant having leased part of the field to the plaintiff, the whole field being then enclosed, he had no right to remove any part of the enclosure; it follows that he had no right to put his stock *within* the enclosure, so as to cause injury to the plaintiff.

The plaintiff was not bound to build a division fence.

When one man rents a given portion of a field, to be cultivated in a given crop, he is prohibited from doing any thing, or so using the remainder of the field, as to defeat the very object for which the tenant had rented the land.

He may not by any act of his, prevent the tenant from enjoying

[Henly vs. Neal.]

the use of the land, for the purpose for which he had rented it. If he does interrupt that enjoyment, either directly, by a trespass upon his tenant, or indirectly, by tearing away portions of the enclosure, so that as a consequence, cattle shall enter and destroy the tenant's crop, he should be liable for all the damage.

2nd. It is contended in the second place, that if the facts as set forth in this declaration, entitle the plaintiff to maintain an action, trespass, and not case, should have been brought. The declaration avers, that the defendant's hogs and cattle, being in his oats field, came into the plaintiff's corn, and eat it up and destroyed it.

Blackstone, in his Commentaries, (3 B. 211,) says, that a man is answerable for the trespass of his cattle, if by his negligent keeping, they stray upon the land of another, (and much more if he permit or drive them on,) and they there tread down his neighbor's herbage, and spoil his corn or his trees. And the action that lies for a trespass committed upon another's land, either by a man himself or his cattle, is the action of trespass *vi et armis*. 6 Bac. Ab. 585. In every trespass upon the close of another, force is implied, for which this action lies. If the injury complained of, be only consequential, upon the act of the defendant, case is the remedy; but if immediate, it must be trespass.

In the case before the court, the cattle of the defendant went upon the field of the plaintiff, and destroyed his corn. The injury was *immediate* upon the act of the cattle, and as the owner is answerable for the trespass of his cattle, as though it were his own, the action of trespass lies.

But the counsel for the plaintiff in error, insists, that although trespass would lie, yet the action on the case, may also be sustained; that in such case, the plaintiff may elect to sue in case or trespass, and for this he cites and relies on Chitty, 146, and 14 John. Rep. 438. Chitty says, "if the injury were merely attributable to negligence or want of skill, and not to the wilful act of the defendant, with intent to injure the plaintiff, the party injured has, it seems, an election, either to treat the negligence or unskilfulness of the defendant as the cause of action, and declare in case, or to consider the act itself as the injury, and to declare in trespass." Let us test the declaration before us by the authority.

The declaration says, that the defendant, "without the permission, and against the plaintiff's orders, turned his stock into his

[Henly vs. Neal.]

said field, that said stock came into the plaintiff's corn, and eat up and destroyed it, which the defendant *knew* they *would* do, when he turned said stock into his, the defendant's field." In the first place, the injury complained of, is alleged to have been done by the *wilful* act of the defendant, and, therefore, is not a case according to the authorities, in which the right of election exists. But in the next place, the plaintiff in the declaration has treated the act itself as the injury. He is injured, he says, because the defendant turned his cattle into his corn field, *knowing* they would go into the plaintiff's corn, and that he did this act *wilfully* against the plaintiff's orders. The case of *Blin vs. Campbell*, 14 John. 433, goes no farther than the passage cited from Chitty. In that case, defendant fired a pistol and wounded the plaintiff's leg. An action on the case was brought, and the court sustained the action, on the ground that it was a case for election. The court said, it clearly appeared the act was unintentional; it is a mere case of negligence. The action on the case, might, therefore, be sustained to recover damages for the negligence. But even then, if the act itself had been stated, as the injury, trespass would have been the remedy. But if it had been alleged, that the defendant fired the pistol *wilfully*, and with an intent to injure the plaintiff, no case for election would have existed.

Although, therefore, we have been strongly inclined to sustain this action, we feel that it cannot be done, unless we break down all distinction between the actions of trespass on the case, and *vi et armis*, which it is needless to say this court cannot do.

We affirm the judgment.

HADLEY, *et ux.* vs. HARPETH TURNPIKE COMPANY.

1. The legislature may constitutionally take private property for public easements, and may incorporate companies with like power.

2. The act incorporating the Harpeth turnpike company, declares, that the chief engineer of the State shall survey and mark the most direct and practicable route for the construction of the road, and makes it the duty of the company to construct the road on the route thus marked out. The chief engineer did not actually survey and mark out the route, but gave such a description of the route which he believed the road should go, as would "serve to guide the directory in its actual location:" Held, that this was not such a designation of the route and location of the road as would bind the directory, if in their judgment it was not the most direct and practicable route.

3. The act also directs, that the road shall be commenced "at a point near the place where the Franklin Turnpike road crosses Little Harpeth." The directory established the commencement of the road about one mile and a half from the point where the Franklin Turnpike crosses Little Harpeth: Held, that a reasonable conformity with the requisitions of the act is all that can be required, and that it could not be said that this point was not in reasonable conformity with the directions of the act.

Hadley and wife filed this bill in the chancery court at Franklin, on the 5th day of March, 1840, against the president and directors of the Harpeth turnpike company, for the purpose of enjoining the defendants from the commission of a trespass, by the construction of a turnpike road through their land, under the act of 1837-8, ch. 103, page 141 to 148.

This act creating the Harpeth turnpike company, directs, that the road shall "commence at a suitable point near the place where the Franklin turnpike crosses Little Harpeth, and shall terminate at Riggs's cross roads."

The 22nd section of the act makes it the duty of the chief engineer of the State, so soon as his duties would permit him, to mark out the most direct and practicable route for the location of the road, and report the same to the governor, &c., and that the route so surveyed and marked, should be the route on which the road should be constructed by the company.

The act also provides, that if the services of the engineer cannot be had, that then, and in that event the president and directors of the company, or their agents, are authorised to mark out and locate the road.

The chief engineer proceeded to examine the country, with a view to a designation of the most direct and practicable route.

[Hadley, et ux. vs. Harpeth Turnpike Company.]

He made a map of a route, and gave a general description thereof. He did not, however, mark it and locate the road. This map and letter of description, or report, was returned to the governor, and by him deposited in the office of Secretary of State, in accordance with the 22nd section of the act incorporating the company. He expressed his regret in this report, that he could not mark out and locate the road, but declared in it that the report would sufficiently indicate the route to the company.

The route designated commenced within two hundred yards of the point where the Franklin turnpike crosses Little Harpeth. The directors, however, disregarded the indications made in the report of the engineer, and located the route differently, making it commence about one mile and a half from the point where the Franklin turnpike crosses Little Harpeth.

No depositions were read on the hearing, and no proof offered to show that any injury would be inflicted upon the land of the complainants, further than might result from a permanent appropriation of a portion thereof for highway purposes.

The bill came on to be heard, on bill, answer, replication, exhibit and report of the engineer, at the May term, 1841, Bramlett, chancellor, presiding. He being of the opinion that the complainants were not entitled to relief, dismissed the bill. Complainants appealed.

Meigs, for the complainants. This bill is filed to enjoin a trespass, contemplated and commenced by the defendants, in constructing a turnpike road through complainants' farm, under the act of 1837-8, ch. 103, page 141 to 148.

The prayer for the injunction is based on a deviation from the route prescribed in the act, and from that reported by the chief engineer, according to the 22nd section of the act.

1. It is admitted, of course, that the legislature may constitutionally take private property, and may authorise a turnpike company to take private property for the purpose contemplated in this act. But it is most strenuously contended, that if the location of a road is left to a company's discretion, they are bound in the exercise of such discretion, honestly and sincerely to conform to the legislative intent, and cannot wantonly, merely for private convenience sake, or to reach some object not intended by the legislature, strain their authority so as to provide for private wants and purposes.

[Hadley, et ux. vs. Harpeth Turnpike Compay.]

2. And if the act of assembly itself exactly ascertain the locality of the road from beginning to end, or if the law point out an officer, whose duty it is made to designate the route of the road, the company cannot, after he has designated the route, select another. These points are illustrated and sustained by the following authorities: 2 Story's Eq. sec. 925 to 929: 2 John. Ch. R. 164: Id. 463: Cooper's Eq. R. 77: 4 Cond. Eng. Ch. R. 378: 1 Ves. Senr. 188: 2 Dow, 519: 3 John. Ch. R. 287: Baldwin's R. 218: 7 John. Ch. R. 334 to 336.

Washington, for the company.

TURLEY, J. delivered the opinion of the court.

It is admitted by the complainant in this case, that the legislature may constitutionally take private property for public easements, and may incorporate companies with a like power. But it is contended, that the location of the easement must conform to the legislative intent; that in this case the Harpeth company have violated that,

1st. By commencing the road, they were empowered to make, at a different point from that specified by the act of incorporation; and 2nd, because the location is not in conformity with that surveyed by the chief engineer of the State, which, it is argued, is made conclusive upon the company by the act. We will examine these objections.

The act incorporating the company was passed in 1837-8, and is to be found in the session acts of that period, page 141, ch. 103. The first section prescribes as the commencement of the road, a point near where the Franklin turnpike crosses Little Harpeth. The proof shows that it is made at a point, about one mile and a half from that place; and the question is, is this distance near that point? We think it is; what is near, is a difficult thing to argue about, and we shall not attempt it; let it suffice, that a reasonable conformity with the requisitions of the act is all that can be required, and surely, it would be difficult to say, that a difference of a mile and a half is unreasonable.

The 22nd section makes it the duty of the chief engineer of the State, as soon as his official duties will permit, to survey and mark out the most direct and practicable route for the construction of the road, and report the same to the Governor of the State, who

[Hadley, et ux. vs. Harpeth Turnpike Company.]

shall file the same in the office of the secretary of the State, and makes it the duty of the company to cause the road to be constructed upon the route thus surveyed and marked out.

It cannot be questioned, that if the chief engineer of the State, has in pursuance of the statute, surveyed and marked out the route for the road, the company is bound by it; but has he done so? We think not; a reference to his report will show this plainly. He says in his report, "it is to be regretted, that want of proper time, will not allow me to make an actual location of the road, and as that cannot be done, I deem it proper to give such description of the route, as will be sufficient to fix its actual position, with near approximation, and such as will guide the directory of the company in its actual location." Now it is manifest that this is not a surveying or marking out of the road, and was not so considered by the engineer, for he says, "it will serve to guide the directory in its actual location;" a thing merely intended to aid them in marking it. Then the road has not been surveyed and marked out by the engineer. What is the consequence? The same section of the act provides that in case the services of the engineer cannot be obtained, the route for the road shall be marked out according to the provisions of the 6th section of the act, which empowers the directors, or a majority of them, or such person as they may appoint, to locate the route of the road. This they are doing, and so far as this case shows, in reasonable conformity with their grant.

The complainant, then, has no right to stop them, and the injunction heretofore granted him will be discharged, and his bill dismissed.

MARTIN vs. EWING, et als.

1. A neglect to give notice to the drawer of a bill of exchange of the non-acceptance and protest thereof, may be waived by a payment of part or promise to pay, if such payment or promise to pay, is made with knowledge of the facts by the drawer by which he was discharged.

2. Such promise to pay, or part payment, with knowledge, amounts to an admission that the bill of exchange has been duly presented, dishonored, and due notice thereof given; and if proved, sustains a declaration in the usual form charging due presentment, protest and notice.

3. Where a bill was protested for non-acceptance and the drawer discharged by the failure of the holder to give notice, and without a knowledge of his discharge, promised on a new consideration that he would pay the bill: Held, that he was liable on a special count, stating the facts, but not on a count charging due presentation, protest and notice.

Ewing and others, surviving partners of Leigh, Maddux & Co., instituted this action of assumpsit, in the circuit court of Sumner county, against P. W. Martin, the drawer of the bill of exchange on Charles W. Allen, of Mississippi, for the sum of \$380 18, which was protested for non-acceptance. It was tried before Judge Maney, at the October term, 1841, and a verdict and judgment rendered in favor of the plaintiffs. Martin appealed in error.

Guild, for the plaintiff in error, admitted that a promise by the drawer to pay a bill protested for non-acceptance, was a waiver of the want of due notice; if the drawer made the promise with a knowledge that he was discharged. Here, however, there was no knowledge, and consequently no waiver. No man can be presumed to intend to waive a legal defence against a liability when he supposes already that he is liable.

But it is attempted here to charge the plaintiff on the ground that he made a promise to pay the bill, founded on a new consideration. This is a new contract, not declared on in the plaintiffs' declaration, and to which the defendant was not called to answer. Evidence of such a contract was not admissible under the declaration averring due presentment, protest and notice. See 1 Chitty, 255, 289, 303.

J. J. White, for the defendants in error, insisted that a declaration in the ordinary form, averring demand and notice, was sufficient to authorise the proof which satisfies these averments, to wit,

[Martin vs. Ewing, et al.]

an express promise founded on a new and good consideration. 7 East, 33: 2 Caines' Rep. 121: 3 Cowen, 252: 3 John. 68: 2 Peters, 96, 101.

TURLEY, J. delivered the opinion of the court.

This is an action of assumpsit in the usual form, against the plaintiff in error, as the drawer of a bill of exchange upon a citizen of the State of Mississippi. The declaration contains the common averments of diligence in presentation, dishonour of the bill, and notice thereof to the drawer. The proof shows that the bill was drawn payable at sight, and dated the 31st of August, 1838, and that it was protested for non-acceptance on the 18th day of January, 1839; no notice of this dishonor was given in pursuance of commercial usage to the drawer, but the proof further shows that some time in the year 1836, a bill had been drawn by the plaintiff and his partner on Leigh, Maddux & Co., for the sum of three hundred and twenty dollars, which bill one Charles W. Allen, by written contract, bearing date January 21st, 1836, agreed to take up; that the bill which is the foundation of this suit, was drawn upon said Charles W. Allen, for the purpose of satisfying the first, and that the plaintiff in error, after the dishonor of the bill, agreed that provided the defendants in error would procure the agreement of Allen and deliver it to him, he would pay the bill, which was done. Upon this state of facts the court charged the jury, that if the defendant promised, in consideration, that the plaintiffs would procure the agreement of Allen, and send it to him, he would pay the bill, and they did so procure it, and tender it to him, that the same, though unequal in value to the amount of the bill, would be a sufficient consideration to support the promise, and the plaintiffs would be in that event entitled to their verdict, although the defendant was not informed that the holders of the bill had not made use of the requisite diligence to charge him as drawer.

This charge is excepted to, and we think for good reason. The declaration is framed as we have seen in the usual form, charging a proper demand, dishonor and notice. There is no count upon the particular contract, upon which the charge is based, and the question is, was the judge of the circuit court warranted by law in saying that a promise for a good consideration to take up the bill, without knowing that proper steps had not been taken to charge him, bound the drawer, under this state of pleading.

[Martin vs. Ewing, et als.]

The law is, that a neglect to give notice of the non-payment of a bill or note, may be waived by the person entitled to take advantage of it; that a payment of part or promise to pay, or any thing equivalent thereto, made by a person after a knowledge of the laches amounts to a waiver of the consequence and admits the right of action. The effect of such partial payment or promise to pay, has been carried still further, and been held not merely to be a waiver of the right to object to the laches, but to be an admission that the bill or note had been regularly presented and dishonored, and that due notice thereof had been given. See Chitty on Bills, 9th American from 8th London Edition, from page 533 to 536, where the cases upon this point, both English and American, are referred to, which fully sustain the above positions. What is the consequence as applicable to the case under consideration? If a man, as drawer or endorser of a note or bill of exchange, with the knowledge that proper steps have not been taken to charge him, promise to pay, he is bound thereby, and may be declared against as a drawer or endorser, whose liability has been legally fixed, because the promise is held to be an admission that the requisites of the law have been complied with, which he will not be permitted afterwards to controvert. But if he promise to pay without a knowledge of the facts which discharge him, he is not bound thereby, and may make his defence. In the case under investigation, the promise was made under a new consideration, which the judge held to be obligatory, without a knowledge of the want of liability. We have no objections to this abstract principle. We think it correct, but not available under this declaration. There ought to have been a special count framed thereon. If the drawer had no knowledge of the laches of the holder, or if he had, it should have been charged that a promise to pay after knowledge was an admission of due diligence, neither weakened nor strengthened by the new consideration. The judgment of the circuit court will, therefore, be reversed, and the case remanded for a new trial.

WASHINGTON vs. CONRAD.

1. A tenant cannot dispute the title of his landlord, or set up in opposition thereto an outstanding title.

2. Where one does not obtain possession from another, but being in possession, acknowledges his title or attorns to him, he is not estopped from showing that he was mistaken in supposing the title to have been in such person.

3. The relation of tenant in common, stands on grounds entirely different from that of landlord and tenant. Each tenant, in common, enters as owner, and holds possession for himself, and is not estopped by the admission of a co-tenancy, from setting up a better title in himself or others.

This action of ejectment was instituted in the circuit court of Robertson county, by Conrad against Washington, and was tried at the June term, 1841, before Judge Martin, and resulted in a verdict for the plaintiff. A motion for a new trial was made, overruled, and judgment rendered. Defendant appealed.

The facts of the case, and charge of the circuit judge, are fully stated in the opinion of the court.

Cook, for the plaintiff in error, cited, 2 Leigh's N. P. 928: 28 Eng. C. L. Rep. 142: 15 do. 257-8: 11 do. 264: 8 do. 235: 4 Wend. 401: 12 Wend. 105.

Meigs, for defendant in error, cited, 5 Wheat. 124: 10 Mass. 283: 3 Conn. 191: 1 Conn. 364: 5 Day, 188.

RESSE, J. delivered the opinion of the court.

Thomas Person was the owner of the land in question in the year 1819, and in that year, Joseph Washington, by deed of conveyance, became entitled, as tenant in common, to an undivided interest in the tract to the amount of 60 acres and upwards, and took possession for himself and Person. He thus continued in possession till 1829, 1830, when the land was sold for taxes, and bought at the sales by Washington and Conrad, and the sheriff made to them deeds; Washington, as before, continued in possession, but claimed the land for himself and Conrad, as tenants in common, thenceforward and until the year 1835. In that year, Person being about to sue him, he purchased from him the whole of the tract, except his sixty acres, for about the sum of \$1,500.

In 1840, Conrad brought this action, Washington having from

[Washington vs. Conrad.]

1835 to 1840, claimed and occupied the land exclusively for himself. On the trial, the court charged the jury, that the lessor of the plaintiff, producing no judgment under which the tax sales were made, the tax sales were void, and communicated to them no title. That this was a question of tenancy, and a presumption of a grant would not arise, the defendant having shown no title, unless he had proven 20 years possession, and if they found from the proof, that Washington, after the tax purchases in 1829 and 1830, took possession of part of the land embraced in the tax sale deeds, claiming to hold under said tax sale title, and admitting the title of the lessor of the plaintiff as tenant in common to one-half of the land, that such entry and possession constituted him a tenant of Conrad, as to the undivided half of the said land, and that he could not afterwards buy in the title of Thomas Person, and set it up in the action as a defence to the recovery of the lessor of the plaintiff, unless it appeared to them, that Washington had surrendered and put Conrad in the possession of the one-half of the said land. That when one tenant in common enters upon land, claiming to hold as tenant in common, admitting the title of his co-tenant, to his share of the land, the relation of landlord and tenant attaches, and the tenant in possession cannot purchase a better outstanding title, and set it up against the title of his co-tenant, until he surrenders possession of one-half of the lands to his co-tenant. Also, if they found, that Washington entered in possession of a part of the 640 acre tract in the declaration set out, claiming to hold under said deed, as the tenant in common of the said Thomas Person, and admitting his title to the balance of said tract, then he would be the tenant of the said Person, and he could not afterwards become the tenant of Conrad to said land, unless it appears in proof, that he had surrendered possession to Person of his part or interest in said land.

A verdict was found for the lessor of the plaintiff, which the court, on a motion made for that purpose, refused to set aside, and this appeal in error has been prosecuted. As the tax sales and deeds thereon, are admitted to be void, and as Conrad, therefore, has no sort of a title whatever, to any portion of the land in dispute, one question which presents itself, is, whether Conrad without title, but upon the mere ground of relation and estoppel, can recover in an action of ejectment against Washington, because he once supposed and admitted, that those void tax sale proceedings

[Washington vs. Conrad.]

had constituted between them the relation of tenancy in common in the disputed premises? In other words, if A. being already in possession of land, admit that B. is his tenant in common, and afterwards claiming exclusively for himself, is sued by B. in an action of ejectment, can B. recover against him without showing any title whatever, and by the mere force of such parol admission? If one, indeed, receive possession from another, and hold under him, he cannot question his title, and is compelled on grounds of public policy, and in maintainance of sound morals and good faith, to surrender the possession to him from whom he received it, and may be evicted in an action of ejectment, without the production against him of any other title, than proof of the tenancy, and although the better title is outstanding in another. This is the relation of landlord and tenant.

But tenancy in common differs widely. The tenant in common, enters for himself upon the possession, enters as owner, owes allegiance to no one, subordinates his title to no other. His co-tenant, not in actual possession, may claim by another deed, may claim by deed of bargain and sale, by devise, or by descent. It may be very uncertain in point of fact, in point of right, who he is. If then the tenant in possession, supposing a particular individual to be his co-tenant, so admits the fact, is he to be estopped, and concluded thereby, as if such individual were his landlord, and he had received possession from him? And can such individual recover upon such mere admission, without showing title, or even although, it may be shown that another is the real tenant in common? or, that the defendant is exclusively the owner of the whole of the estate? We think this should not be so. For many purposes, indeed, the possession of a tenant in common enures to the benefit of the whole estate, and of other tenants in common, but if the tenant in possession claim the estate for himself, and by ouster of the other tenants in common put them to their action, we think they must recover by producing their title and showing their right.

But if the relation between Washington and Conrad were identical in legal effect with that between landlord and tenant, as supposed by the circuit court, still as Washington, at the time of the existence of the supposed relation, was under the estoppel of a similar prior relation with Person, that prior relation would continue, notwithstanding the attempt to form a second one with another. This, indeed, was charged by the circuit court.

[Puckett *vs.* James, et als.]

In the third place, Washington did not receive the possession of the land from Conrad, but was in possession already, under and by virtue of another title, and if, indeed, an attornment under such circumstances to Conrad had taken place by mistake of his title and right, Washington not having received possession from him, would probably not have been concluded from showing the mistake. See cases referred to at the bar. 28 Eng. Com. L. R. 142: 15 Eng. Com. L. R. 257-8: 11 do. 264: 8 do. 235; 12 Wend. 105.

Upon all these grounds, therefore, we are of opinion, that the judgment of the circuit court must be reversed, and a new trial granted in the case.

PUCKETT, *Guardian*, *vs.* JAMES, *et als.*

An executor requested a creditor should give the estate indulgence, till the debt the estate owed for land, should be paid: Held,

1. No particular form of demand is required by the proviso of the fourth section of the act of 1789, ch. 23, and such demand may be inferred from the fact, that a special request for indulgence has been made.

2. That the request for indulgence till the land should be paid for, is sufficiently definite, and that the statute would commence running from the time the land was paid for, and not before that time.

3. If an executor pay a debt clearly barred by the statute of limitations, is he guilty of a *devastavit*?

4. Where an executor is sought to be charged with a *devastavit* for the payment of a debt which was clearly just, and the collection of which was delayed till the time specified in the statute of 1789, ch. 23, had elapsed, such strict proof will not be required of the executor, that the debt was delayed by his request, as would be required of a creditor seeking to charge the estate.

5. Ledbetter, having made his will, devising his estate to his daughter Melissa, died. Melissa not having received the estate from the executors of her father's will, died, leaving children: Held, that such children could claim only as the distributees of their mother, and could not demand a distribution from any person save the administrator of the deceased mother. *Thurman vs. Shelton*, 10 Yerg. Rep. 385.

Ready, for plaintiff.

Keeble, for defendants.

[Puckett vs. James, et al.]

GREEN, J. delivered the opinion of the court.

David Ledbetter died in 1824, having made a will, in which his wife E. C. and A. James were named as executor and executrix. At November term of the county court of Rutherford, they proved the will, and took upon themselves the burthen of its execution.

A short time before his death, the testator purchased a tract of land from Henry Finger, and executed several notes for the purchase money, payable at different times. The last notes fell due several years after his death. The said testator, was also indebted to the estate of Isaac Ledbetter, deceased, upwards of seven hundred dollars, due on several small notes, then in the hands of William Ledbetter, one of his executors. Anderson James, executor of David Ledbetter, consulted with William Ledbetter, the executor of Isaac, as to the best means of paying the debts of the estate, without a sale of the land and negroes, which he was anxious to avoid. It was found on making an estimate of the means in his hands, and of the debts due from the estate, that there were not assets to pay all the debts, without resorting to the land and negroes. Upon making this discovery, the said executor James, requested William Ledbetter to suspend the debt due his father's estate (the aforesaid Isaac, deceased) until the land was paid for, which William agreed to do.

Some years (probably more than two) after their qualification, the executors of David Ledbetter, signed a written memorandum, requesting of William Ledbetter further indulgence, and agreeing to confess a judgment for the amount of the debt due *his* testator, whenever he should request it. In pursuance of this agreement a judgment was confessed in his favor for \$792 87½, in October, 1830, and about the time Finger obtained judgment for the last payment due for the land. This payment was satisfied by the sale of several negroes belonging to the estate of the said David.

Melissa Ledbetter, daughter of David, intermarried with William Puckett, by whom she had issue, the complainants, and has since died. No administration has been granted of her estate. This bill is filed by the complainants, as distributees of their mother, claiming *her* share of *her* father's (David Ledbetter's) estate, and alleging that the debt due Isaac Ledbetter's estate, was barred by the statute of limitations of 1789, ch. 23, at the time the judgment aforesaid was confessed, and that the said executors committed a *devastavit* by

[Puckett vs. James, et als.]

the confession thereof. Eleanor C. Ledbetter, the executrix, has died intestate, and the defendant Howse, is her administrator, and the other executor, Anderson James, has died, leaving a will, of which, the other defendant, Frances James, is executrix.

1st. The first question is, was the request for delay, which was made by James, executor to William Ledbetter, of such a character as to prevent the operation of the statute of limitations, during the period of such delay?

The proviso of the 4th section of the act of 1789, ch 23, is in the following words: "That if any creditor, who after making demand of his debt, or claim, shall delay to bring suit at the special request of the executors or administrators, then in that case, the said debt or demand shall not be barred during the time of the indulgence."

In the case before us, the evidence is, that the executor requested William Ledbetter to suspend the debt due his father's estate, until the land was paid for. The statute does not require any particular form of *demand* to be made by the creditor. To speak of his claim and desire its payment, is a sufficient *demand*. Nor is it necessary, that there should be *express* proof of a demand. That it was made, may be inferred from the circumstances. The *special* request for delay, implies a demand. Such request would be uncalled for, so long as the creditor was silent, and, therefore, when proved, furnishes evidence that such conversation had occurred, as would amount to a demand within the meaning of the statute. Here the proof is, that the request for delay was *special*, not merely, an inference of the creditor, that it would be agreeable to the executor, that he should delay, but an urgent special request, growing out of the estimate he had made of the condition of the estate, and with a view to accomplish the important object of paying for the land, so that the family might have a home. Here too, the request stipulated for a special delay, for a definite time of indulgence. Not, to be sure, for a particular *length* of time named in the request, but for the time that might elapse until he could accomplish a certain *event*, named and stipulated in the request. There is nothing vague or indefinite in the period here fixed, for if the land were paid for, the statute would run from that period, in the same way that it would, if a particular day of a specified year had been named.

We think, therefore, that in this case, there is proof, that after a

[Puckett vs. James, et als.]

demand was made for this debt, the executor made of the creditor *a special request for delay*, for a definite period; and upon the construction of this statute, in the case of *Trott vs. West*, 9 (Yerg. Rep. 433,) these executors could not have resisted a recovery of this debt, in an action at law, upon the ground, that the request was not such an one as would prevent the bar of the statute.

But the case is much stronger for the executors, when, by a bill in equity, a legatee seeks to charge them with a *devastavit*, for paying the debt, than it would have been for the creditor, in an action at law, against the executors, for the recovery of the debt.

If the executors felt that it was doubtful, whether the creditor could recover, and knowing that the debt was a just one, and that they had induced him to delay by their request, it might be very proper for them to pay the debt. They would thus have avoided an expensive litigation, that might have resulted in a recovery of the debt at last, involving the estate in unnecessary costs, and themselves in dishonor.

We do not intend to intimate, however, that if an executor pay debts, clearly barred by this statute, he would not be guilty of a *devastavit*, for which he might be rendered liable in this court. All we mean to say, is, when he is sought to be charged in a court of chancery, with a *devastavit* for the payment of debts that were clearly just, the payment of which had been delayed by his request, he is not to be held to so strict proof, that such request was within the proviso of the statute, as the creditor, seeking to recover his debt, would be required to make.

2nd. But in this case, the complainants have no right to litigate this matter. Their mother having died, they must claim as her distributees, and not as legatees of their grandfather. Her representative must, therefore, sue.

If her administrators were to recover the estate for which this suit is brought, then the present complainants might, by bill, compel him to distribute it to them. *Thurman vs. Shelton*, 10 Yerg. Rep. 389. Let the decree be affirmed.

JOHNSON, *et als.* vs. PERRY.

1. Johnson attempted illegally to chastise the slave of Perry: the slave got loose and in flight jumped down a precipice and fractured his leg: Held, that trespass, *vi et armis*, was the appropriate remedy; the injury being direct, whenever there has been an illegal act done, and the consequence thereof, such as might reasonably have followed.

2. Where the leg of a slave is broken and damages are given for the deteriorated value of the slave in consequence of this permanent injury, such damages are in lieu of loss of service as being in full compensation for the wrong done.

3. Proof of medical bills contracted and paid after the issuance of the writ, is not competent evidence, nor proof of any collateral damages arising after suit instituted; proof may however be received that the slave died after the suit was instituted, or that the injury proved to be greater by lapse of time, such results being the immediate consequences of the trespass.

Perry instituted an action of trespass, *vi et armis*, in the circuit court of Sumner county, against Baker, A. and James Johnson, on the 31st day of October, 1839. The plaintiff set forth as his cause of action, an assault upon his slave by the defendants, by which the leg or knee of the said slave was broken, and he thereby lost his service, paid large medical bills, &c.

The defendants pleaded not guilty, and issue was joined thereupon. The cause was submitted to a jury at the February term, 1841, Judge Maney, presiding. Proof was introduced that some verbal altercation took place between the slave and one of the defendants, and that thereupon the defendants seized the slave, and were attempting to tie him for the purpose of inflicting chastisement on him, and that whilst they were preparing so to do, the slave made his escape, and in his flight leaped down a precipice about four feet high and fell. It was immediately ascertained that the bones of the knee were broken, or that the knee was badly sprained. It appeared that the slave was looking back at the time he leaped; and that he could have made his escape by running in several other directions. There was proof that a physician of not much skill was immediately called in, and that some three or four months after the injury was inflicted, and some time after the suit was brought, another physician was called in. He stated that the bones of the knee were broken, and that he took out several pieces of broken bone; that it was a permanent injury, impairing much the value of the slave. He also stated that Perry had paid him a medical bill of fifty dollars; that the slave, previous to the injury, was worth from

[Johnson, et al. vs. Perry.]

eight hundred to a thousand dollars; that the slave would hire at \$150 per annum, and that his boarding and clothing were worth about \$50 per annum.

In reference to the extent, the value of the slave was impaired by the injury, testimony was submitted to the jury of a contradictory character. The defendants introduced proof for the purpose of sustaining the positions,

1st. That the attack on the slave was produced by his insolence and intoxication, and therefore justifiable.

2nd. That Perry's management of this slave was such as to impress upon him an inclination to be insolent and calculated to bring him in collision with white men. This testimony was rejected.

3d. That the precipice being only about four feet high with a sandy bottom below, the bones could not have been broken, but that the joint was only sprained, and the injury therefore not serious and permanent. Physicians were examined to sustain this view of the case, and the slave examined before the jury by the physicians. He was then on crutches. Proof was also introduced to show that the injury had been increased by drunkenness, exposure and unskilful treatment.

4th. That the slave could have made his escape in other directions, and that the injury was not contemplated by the defendants, involuntary and accidental.

Upon all these points there was much testimony, which need not here be set forth. The jury retired, under the charge of the court, and there being a difference of opinion in reference to the amount of damages proper to be returned, they determined that each should put down on a piece of paper the amount he was willing to return, the entire sum added up, and the aggregate divided by twelve, and the result returned as their verdict. This was accordingly executed, and when the result was thus ascertained it was found to be between \$730 and 760 dollars. This did not give satisfaction, and they ultimately agreed upon \$800 as a proper verdict and returned that sum accordingly.

A motion for a new trial was made on the general merits of the case, and on an affidavit of a juror stating the facts as to the mode adopted in ascertaining the amount of damages. The judge, however, overruled the motion, and judgment having been rendered, the defendant appealed.

[Johnson, et als. vs. Perry.]

This case was argued by Mr. Trimble and Mr. J. J. White for the plaintiffs in error, and by Mr. Guild and R. M. Burton for the defendant in error.

TURLEY, J. delivered the opinion of the court.

This is an action of trespass, *vi et armis*, brought by the defendant in error, to recover damages against the plaintiffs in error, under the following circumstances: Perry was the owner of a negro man slave, David; a controversy of an unimportant character arose between him and Asa Johnson, one of the plaintiffs in error, the result of which was, that the plaintiffs in error undertook to inflict personal chastisement upon him; he escaped from them, and in flight incautiously jumped or fell from a small precipice of a creek, and fractured one of his legs, by which he has been materially damaged. There was judgment for the defendant in error, for the reversal of which, several causes are assigned.

1st. It is contended that the action is misconceived; that it should have been trespass on the case, and not trespass *vi et armis*, because it is said, that the injury did not proceed directly from any act done by the plaintiffs in error, but was merely consequential. It is often a question of great difficulty to determine whether the injury be direct or consequential, but we think it is not so in this case; the injury is always direct when a wrong act is done, and the consequence is such as might reasonably follow, as if a man strike a horse, upon which another is sitting, by which he is thrown and injured, the action is trespass, not because it was a necessary consequence that he should be thrown, or that it was designed that he should be, but because it is an event which may reasonably follow, and in direct connection with the act done. So in the case of Caldwell in 7th Yer. 38, the defendant set his dogs upon the mare of the plaintiff, the consequence of which was, that in the fright produced thereby, she ran up on a stake and was killed; this was held to be an immediate injury, resulting from the act of the defendant, yet it did not necessarily follow in a concatenation that this must have been the result; she might have run clear of the stake, and received no injury, and it is certain that the defendant could not have anticipated that she would have run upon the stake, as she had every other point of the compass to run to. Then, to apply these principles to the case under consideration: the plaintiffs in error were illegally engaged in chastising the servant of the defen-

[Johnson, et al. vs. Perry.]

dant; he broke from them and fled; in his flight he incautiously jumped or fell from the precipice, and received the injury complained of. Now it was no more a necessary consequence, that he should have fled to the precipice, than that the mare should have run upon the stake, but just as much so, and in as much as it did take place, and that too in consequence of the illegal act of the plaintiffs in error, the injury sustained must be held to be the direct consequence of the wrong done.

2nd. It is contended that the court erred in not charging the jury that the defendant in error was only entitled to recover for such cause of action as existed at the time of the issuance of the writ, and that therefore they could not give damages for any loss of service to the master, nor for medical bills paid by him for attention to the wound of his servant, which accrued after the issuance of the writ. We think that damages for the loss of service are to be given, where the injury has been temporary, and that no more can be given than accrues before the commencement of the action; that where the injury is permanent and the damages are for the deteriorated value by reason of the injury, that then, damages are to be in lieu of the loss of service, as being a full compensation for the wrong done, as in the case referred to from 7th Yerg. Where the property was actually destroyed, the damages would be the value of the property, and not for any loss of service in the cultivation of a crop or otherwise; so in this case, if the negro had been killed, the damages would have been his actual value; if he has been permanently injured, and the jury, in the assessment of damages, have taken as the criterion, the difference between the actual value of the slave without the injury and his present value with it, no damages ought to be given for his loss of service, because the difference of value is a plenary satisfaction for the wrong done, placing the owner in *statu quo*, unless under all the circumstances, they might think proper, as a punishment, to give smart money.

We think further, that no damages which accrue after the commencement of the suit can be recovered, except such as are the immediate consequence of the trespass, as if a man's property has been injured, and after the commencement of the suit, it dies, proof of the fact may be received to aggravate the damages; so if the injury proves to be greater by the lapse of time than it was at the commencement of the suit, the same may be done. This princi-

[Johnson, et als. vs. Perry.]

ple excludes all collateral damages, arising after the commencement of the suit and of course medical bills.

Let us now see how this case stands under these principles. Proof was heard, showing the nature of the injury, a little conflicting as to what may be the permanent result, but not sufficiently so as to have produced a reversal of the judgment. Proof was also heard showing loss of service, and a liability created for medical services, accruing after the commencement of the suit. Upon this the court charged the jury, "that if they found for the plaintiff, the *maximum* of damages should be the injury sustained; that they were not restrained to the immediate deterioration of value, but might include all damages resulting as a necessary consequence of the injury, such as reasonable surgeon's fees, though paid subsequent to the institution of the action."

This charge, it will be seen, conflicts with the position assumed by us in this case, in maintaining that the surgeon's bill is a necessary consequence of the wrong, when we hold it to be merely a collateral consequence. The charge also was calculated to mislead the jury, and no doubt did, by leaving the impression that medical bills contracted after the commencement of the suit might be taken into consideration in estimating the damages; and perhaps, so the judge meant, although he has only said in his charge, "such as were paid subsequent to the institution of the suit." We therefore think the second point is in favor of the plaintiffs in error.

3d. It is contended that the court should have charged the jury, if the injury was neither the probable nor the necessary consequence of the act done, but the result of inevitable accident, that the plaintiffs in error were not liable. As an abstract proposition, this is true, but altogether out of the facts of the case, and therefore not necessary to be involved in its discussion. In the reasoning upon the first point, we have shown that the injury received, was a direct result from the wrong done, and it therefore could not have been the result of accident.

4th. It is contended that the court erred in not granting a new trial, because of excessive damages. It is not important to investigate this principle for this case, as it is reversed upon another point, but we will merely say, we would not have given a new trial for that cause.

5th. It was contended that the misbehavior of the jury furnishes a good cause for a new trial. The affidavit of one of the

[Hinkle vs. Blake, et als.]

jurors shows that upon their retirement, each of the jurors wrote upon separate pieces of paper the amount of damages he was willing to allow, which was put into a hat and drawn out, the aggregate of which, divided by twelve, amounted to between \$730 and \$760 dollars. This result was not satisfactory to the jury, and upon further deliberation the amount of damages was fixed at \$800. This, it is said, vitiates the verdict, and the case of *Elledge vs. Todd*, 1st Humphreys, 43, is cited as authority. That case does not sustain the position. It determines that if a jury, for the purpose of ascertaining what amount of damages shall be assessed, agree among themselves that each member of the body shall set down the amount he is willing to allow, and the result shall be the verdict and make it so, the verdict is vitiated, and a new trial will be granted: that is not this case. There was here no agreement to make the result the verdict; in fact, a larger amount was given. There is no cause for a new trial.

Upon the whole, we reverse the judgment, and remand the case for a new trial, in accordance with the principles, here laid down.

HINKLE vs. BLAKE, et als.

A sheriff made return on an execution that he had retained the money collected, to discharge the damages he had sustained by judgment, against which the plaintiff in the execution had given him a bond of indemnity: Held, that this was an insufficient return, and subjected the sheriff and his securities to a motion under the act of 1837-8, ch. 190.

Taul, for Hinkle.

Meigs, for sheriff and securities.

GREEN, J. delivered the opinion of the court.

An execution issued the 11th of February, 1840, from this court in favor of the plaintiff, against Fulton and Cleveland, administrators of Thurmond, for \$576 76, besides costs. This *fi. fa.* came to the hands of defendant Blake, sheriff of Lincoln county, on the 17th of February, 1840, upon which he has made the following return: "Received, March 18th, 1840, of James Fulton, six hundred and fifty-nine dollars and forty-two cents, in full of this *fi. fa.*; retained on *fi. fa.* of Isaac Broils against Joseph Hinkle in

[Hinkle vs. Blake, et als.]

my hands, forty-eight dollars sixty cents; retained on bond given to me by Joseph Hinkle to indemnify me in the event of a motion being made against me as sheriff of Lincoln county, in the chancery court of said county, in the case of Joseph Chrisman against Joseph Hinkle, to pay all costs and damages that might accrue to me, for his failing to pay said claim in my hands against him; and he did fail to pay said debt agreeable to his bond, therefore judgment was taken against me, by which I sustained damage to the amount of two hundred and ninety-three dollars and seventy-one cents, which amount is retained."

Notice having been given according to law, the plaintiff now moves, upon the production of a certified copy of said sheriff's bond, for judgment against him and his securities for the money collected on said *fi. fa.*, deducting the amount retained to satisfy Broils' execution against plaintiff. The act of 1837-8, ch. 190, sec. 1, makes it the duty of the sheriffs of this State to return all executions coming to their hands, "with a sufficient response" thereon, on or before the day of return, mentioned in such execution. The question then is, whether the return of the sheriff in this case is a "sufficient response;" and we think that most clearly it is not. The sheriff undertakes to retain in his own hands the amount of damages which he supposes he is entitled to recover against the plaintiff on an indemnifying bond, which the plaintiff had executed to him in another case. This he has no right to do. If it were allowed in this case, a sheriff might in every case, where he supposes he has a cause of action against the plaintiff in an execution, retain so much of the money he may collect on the execution, as he may suppose will satisfy his demand. As he has no right to retain this money, the response or return he has made, is not such as the law requires, and therefore is not sufficient to protect him from liability to this motion. The words "sufficient response" in this act, require that the return shall be such, as the law makes it the duty of the sheriff to endorse on the *fi. fa.* and such as would not under the act of 1835, ch. 19, sec. 6, be an "insufficient return."

The plaintiff is therefore entitled to his judgment, for the sum collected upon the *fi. fa.* by the sheriff, deducting the sum of \$48 60, retained to satisfy an execution in his hands against the plaintiff, together with twelve and one half per cent damages, and interest on the amount at the rate of six per cent up to the return day of the execution.

REID vs. HOUSE, et als.

1. The rule, *caveat emptor*, applies in general to sales by execution; but more emphatically as to the title to the property sold. The purchaser must risk the title.

2. Where a plain mistake is made by the sheriff, the defendant in the execution and the purchaser, as to the real estate levied on and sold, and the mistake was discovered before the money was paid over to the plaintiff in the execution: Held, that the purchaser was entitled to relief in chancery.

3. A court of chancery is the more appropriate forum for the correction of such errors.

4. Judgments in the Federal court are embraced in the 7th and 8th sections of the act of 1831, ch. 90, regulating the lien of judgments; and, therefore, judgments obtained in the Federal court at Nashville, against Baldwin and Anderson, residing in *Williamson county*, which were not registered, lost their priority to judgments rendered against them in *Williamson*.

5. A. had a judgment against the members of a partnership for the individual debt of a partner; B. had a judgment against the partnership: Held, that both judgments bound the separate real estate of each partner without priority.

Alexander, for the complainant.

Figures, Cook and Fogg, for the defendants.

REESE, J. delivered the opinion of the court.

At the November term of the *Williamson* circuit court in the year 1839, four judgments were rendered against James Anderson and Henry Baldwin, jr., one in favor of Robert M. House, one in favor of Hopkins & Brothers, one in favor of William R. Saunders, and one in favor of William P. and Edwin L. Thomas. Upon all these judgments, executions issued, and were levied by William Harrison, sheriff of *Williamson county*, upon lots Nos. 102, 103 and 127, in the town of Franklin, as the property of James Anderson, one of the defendants in the executions, and on the 7th day of March, 1840, the property was exposed to public sale by the sheriff, and the complainant Reid became the purchaser, for the sum of sixteen hundred dollars. Complainant had made a private agreement with Anderson, to purchase the property from him, and before the levy and sale, had been put into possession of the premises; but as Anderson was embarrassed, it was deemed proper by them, in order to pass the title, that there should be a sale by the sheriff. Anderson was in fact owner of lot No. 102, and of small portions

[Reid vs. House, et als.]

of lots Nos. 103 and 127. But he believed himself to be owner, also, of one-half of lot No. 126, of which he had been in possession for some years, having purchased at a chancery sale, in which some mistake as to the description of the premises probably occurred. That portion of lot No. 126 was enclosed as part of his premises, and upon it stood the stables, carriage house, crib, &c., and he, the sheriff, and the complainant, all believed at the time of the sale and levy, that it was embraced and described in the terms used, namely, "lots 102, 103 and 127." The abstraction from the premises of the portion of the lot No. 126, in question, with the improvements thereon, would interfere greatly with the use and enjoyment of the property, and would diminish its value one-third.

At the September term of the United States circuit court, for the district of Middle Tennessee, at Nashville, four judgments were obtained against the said James Anderson, and the said Henry Baldwin, Jr., one in favor of Foster and Eaton, one in favor of Hopkins and Hall, one in favor of Marseills and Martin, and one in favor of James A. King.

All these judgments, as well those in Williamson circuit court, as in the court of the United States, were founded on claims against Anderson & Baldwin, as partners in a mercantile concern, except, that of Robert M. House, which, although against Anderson & Baldwin jointly, was for the separate debt of Anderson, Baldwin having become bound and liable as his accommodation endorser.

After the sale, the complainant gave to the sheriff, a check upon a bank for the amount of his bid, but becoming aware of the existence of the Federal court judgments, and being advised that they might create a prior and preferable lien on the property sold, and learning the mistake of the sheriff, of himself, and of the defendants, in the executions, as to the description of the property levied on and sold, he gave notice to the cashier not to pay the check, and it was not paid. And under these circumstances, he filed his bill against all the parties, herein named, to have the sale set aside, and a new sale ordered, and for general relief.

And the question which first presents itself, is, whether the complainant is entitled to the relief prayed, upon the case made in the record?

It has been strongly insisted that he is not, upon the ground, mainly, that the rule of *caveat emptor*, emphatically applies to purchasers at sheriff's sale, and for this many authorities have been

[Reid vs. House, et al.]

cited. Unquestionably that rule does, and ought to apply to such sales, in general. The purchaser must risk the title. He can get no warranty as to that, and if it turn out that he was mistaken, he must bear the loss, and cannot be relieved here.

And, even, if he were mistaken in a matter of fact, relating to the property sold, arising from misdescription or otherwise, and the money has gone into the hands of judgment creditors, it might be difficult to give him relief, because from the relation of the parties, and the circumstances of the case, it might be difficult to affect their consciences.

But where, as in the case before us, a plain mistake, not as to the title, but as to the property levied on and sold, was made by the sheriff, the defendants in the executions, and the purchaser, all of them supposing, that the land included in the dotted lines of the survey, set forth in the record, had been levied on and sold, and was comprised by the terms of description used, and where the mistake so materially effects the value of the property actually sold, and where, before the money has been paid, the purchaser applies to set aside the sale, in such a case, and under such circumstances, we think he is entitled to relief. Who can object to it? Not the defendant in the execution, because he led the officer and the purchaser into the mistake.

Can judgment creditors successfully resist the application, and conscientiously insist, that money bid under such circumstances, and not yet paid to them, should yet be received?

We think they cannot. In the case of the *Ontario Bank vs. Lansing*, 2 Wend. Rep. where on the sale of property, under a *fi. fa.*, a plaintiff inadvertently bid a less sum than the amount of his execution, the sale on his application was set aside, and a new sale ordered, because under their redemption law, as against a junior judgment creditor, he could not, in his actual circumstances, have enjoyed the advantages to which it had been his purpose to entitle himself.

In the case of *Mulks vs. Allen*, (12 Wen. 253,) the property was bid in at \$840, under the belief and impression of the purchaser, and of the officer conducting the sale, that the premises described in the advertisement, consisted of a woollen factory, owned by the defendant, worth upwards of a thousand dollars, whereas it was discovered, that the premises only comprised a garden spot, worth only one hundred and fifty dollars. It was alleged, that the officer

[Reid vs. House, et als.]

was misled by the defendant in the execution, when applied to for information, respecting his real estate. The defendant, however, denied all intention to deceive.

The court set aside the sale, remarking, that whether the defendant did, or did not, intend to mislead the plaintiff and the officer, there was no doubt they were deceived by the representations he made. These, indeed, were cases at law; but in the case of *Lansing vs. Quackenbush*, (5th Cow. 38,) the court of law refused to correct the endorsement on the execution, when property had been sold, which did not belong to the defendant, because a court of equity was deemed a more proper tribunal to grant relief. And the authority of the cases we have referred to, are the stronger, because they occurred at law: a court of chancery being no doubt, in general, the more appropriate forum for correction and relief in such cases. Each case must, indeed, be determined, very much upon its own circumstances, and the time of the application, and the attitude of the parties before the court. In the case, however, before us, we are of opinion, both upon principle and authority, that the complainant is entitled to the relief prayed for.

It becomes necessary, that we should determine, in the second place, the question of priority, presented in the record, between the several defendants in this bill, with a view to the proper distribution of the proceeds to arise from a re-sale of the premises. This, as to one class of the defendants, will depend upon the construction, which may be given to the provisions on the subject of the lien of judgments, contained in the act of 1831, ch. 90. It will be seen by a reference to that act, that its leading object, as to deeds of bargain and sale, mortgages and other instruments, required to be registered, was to abolish all relation, between the registration of the instrument and its date or execution, which had previously existed, and to make thenceforward, the registration itself an effective part, as it were, of the execution of the instrument, giving the right to him who should first register, and enabling all persons thereafter safely to purchase, so far as conveyances were concerned, by simply inspecting the register's office of the county in which the property might lie. And if it had been the purpose of the legislature to abolish the lien of judgments, in all cases, which they had competent power to do, this would have been sufficient. But such was not their purpose; they intended that a modified lien by judgments, for a limited period, should con-

[Reid vs. House, et al.]

tinue to exist, and the question with them, was, how this should be effected, so as to harmonise with the general scope of the bill, and not to defeat their leading purpose, which was, that all might readily know from whom they could safely purchase property. This was effected by the provisions contained in the 6th, 7th and 8th sections.

In the 6th section, they declare, that "the lien of a judgment and execution (as hereinafter regulated) shall have preference to any deed or bond, or other instrument not registered, at the time the said lien of said judgment or execution attached."

The following sections contain the regulations referred to, showing how and where said lien should attach.

Sec. 7. "All judgments obtained in any court of record in this State, shall be a lien upon the debtor's land from the time said judgment was rendered; *provided*, said judgment is rendered in the county where the debtor resides at the time of its rendition, and provided, an execution is taken out upon said judgment and the said land sold within twelve months after the rendition, unless," &c.

Sec. 8. "When judgments are rendered in any other county, than that in which the debtor resides, the lien of the judgment shall take effect only from the time when a certified copy of said judgment, shall be registered in the county where the debtor resides," &c. and "all judgments so certified and registered shall be good and effectual from said time," &c. The question is, whether judgments rendered in the Federal courts are included in these provisions. Obviously they are included by the terms used, "all judgments obtained in any court of record in this State," and they are as certainly embraced by the purpose and policy of the statute. If they are not embraced by these terms, and the lien be not given to them by this or any other Tennessee statute, then they have either no lien at all, or else a lien, uncircumscribed in point of time, or territory. The object of the statute was, that by going to the county where the land lies, a purchaser might know whether there were prior conveyances or mortgages, and by going to the county where the owner resided, he might from the courts of record there, and from the register's office, know whether the lien of any judgment had attached, and thereupon safely buy.

But if Federal court judgments have a lien without the registration of a certified copy of the judgment in the county of the debt-

[Reid vs. House, et als.]

or's domicile, then it would be necessary for the purchaser, in order to buy safely, to examine the records of the Federal courts in the three divisions of the State. But it is argued that, with reference to the jurisdiction of the federal courts, it may be said of a debtor, who resides in Williamson county, that he resides in the county in which the judgment was rendered. Of this distinction it may be observed, not only, that it contradicts the letter, and contravenes the objects of the statute, but that it is too attenuated to be either very tangible or very visible. Besides, it would alike apply to the judgments of the supreme and chancery courts; and as to the latter we have a legislative assurance that it does not apply. For some one having doubted, perhaps, and without cause, it would seem, whether, by the term "judgments," decrees in the chancery court were embraced, the act of 1833, ch. 92, sec. 6, was passed, which provides, "that decrees rendered in chancery for the payment of money, shall be a lien upon the lands of the person or persons against whom the same may be rendered, in like manner and under the same provisions, restrictions and limitations as judgments at law, by the 7th and 8th sections of the act which this is intended to amend." In truth, the lien of judgments by our system is not predicated upon the more extensive or more limited territorial jurisdiction of the court rendering them. The records of the court rendering the judgment constitute a lien upon the lands of the debtor, wherever situated, without further registration, if the county where rendered contains the domicile of the debtor; if it does not, then a certified copy of the judgment, registered in the county of the domicile, creates a lien upon the land of the debtor, wherever situated.

Such is our view of the statute; and the question is certainly free from all doubt. But it has been suggested, thrown out rather than pressed before us in argument, that to require the registration of a certified copy of federal court judgments in the county of the debtor's domicile, in order to the creation of an effective lien, would improperly interfere with the action and process of those courts.

But it is an axiom of the *jus gentium*, as fundamental as it is familiar, that to prescribe the rules for the transfer of real property, by the act of the owner, or by the operation of law, falls peculiarly and exclusively within the competency of the local government.

[Reid vs. House, et als.]

The lien of a judgment is one of the rules for such transfer by operation of law. It is a step towards, it is the inception of such transfer. It is a law of title; it is a rule of property; congress have not, nor do they claim any power whatever over the subject. To require a creditor in a federal court judgment to do that which is required of a creditor in a State court judgment, namely, to register a copy of such judgment in the county of the debtor's domicile, in order to the creation of an affective lien, is not to interfere with the process of the U. States courts or to control their officers in its execution. As well might our laws on the subject of registering deeds of conveyance, be regarded as creating such interference as our law on the subject of registering judgments. They are subjects peculiarly and exclusively within our own competency. Upon principle this is so unquestionably true, that it seems scarcely necessary to attempt to fortify it by a reference to the 34th section of the act of Congress of 1789, or to adjudications in the courts of the U. States. The elaborate judgment by the late chief justice Marshall, in the case of *Wayman vs. Southard*, 10th Wheat. 1, was in a case arising under the Kentucky endorsement and replevin law, which sought to regulate and control the officer in the execution of his process. But many observations made in that case, tend to establish a marked distinction between that case and the principle of such a case as is now before this court. The case of *Ross vs. Duval*, 13 Peters, 45, arose upon an act of Virginia, passed in 1792, providing that "judgment within any court of record within the commonwealth, where execution hath not issued, may be revived by *scire facias*, or an action of debt, brought thereon, within ten years next after the date of such judgment, and not after." It was held by the circuit court of the U. States for the district of Virginia, not to be obligatory upon that court.

But the supreme court of the U. States say, the act in question is substantially a limitation on judgments. It is not, therefore, an act to regulate process. If this, then, say they, be a limitation law, it is a rule of property, and under the 34th section of the judiciary act, it is a rule of decision for the courts of the U. States.

The case of *Baldwin vs. Phillips*, before Justice Baldwin, arose on a statute of Pennsylvania, which limits the lien of a judgment to five years, unless revived by *scire facias*. The court says, "the terms of this law extend to all judgments, in any court of record within this State, which are broad enough to take in

[Reid vs. House, et als.]

those of this court. Its object is declared to be, "to prevent the risk and inconveniences to purchasers of real estate, by suffering judgments to remain a lien for an indefinite length of time, without any process to continue or revive the same," which apply in whatever courts such judgments are rendered. We cannot consider it as a mere process act; it is a part of a great system of jurisprudence, for the safety and protection of purchasers," &c. and the court in that case, gave effect to that act. See Bald. Rep. vol. 1, page 274; &c. Upon the whole, then, we are constrained, upon authority as well as principle, to hold that the prior judgment creditors in the federal court, not having procured a certified copy of their judgments to be registered, conformably to the statute, in the county of Williamson, the county of the domicil of their debtors, must be postponed to the subsequent judgment creditors, who obtained their judgments in the circuit court for the county of Williamson. As to the remaining question presented for discussion in the claim of Robert M. House to a preferable and exclusive lien founded upon the ground, that although he has a joint judgment against both Baldwin and Anderson, yet it arose originally from the separate debt of Anderson, while the other judgments are founded upon partnership transactions; that question may be very briefly disposed of. This is not a case where there are two funds before the court to be distributed, and where the court are called upon to adjust and settle, upon grounds of general equity, the rights of the parties so as to attain equality.

The simple question is, whether, when one has a judgment against a member of a partnership concern for his separate debt, and another has a judgment against the partnership, both constitute a lien upon the separate real estate of each partner. Of this no one can doubt. The act of 1789, ch. 57, declares that in all cases of joint obligations or assumptions of co-partners or others, suits may be brought and prosecuted on the same, in the same manner as if such obligations or assumptions were joint and several. Of course, for all the purposes of lien, there can be no difference between the joint and separate creditors of the individual partner, and whether in any given case, they can repel each other in the distribution of the joint and separate funds, will depend upon circumstances to be shown in the case, and upon the application to them of the general principles of equity.

HAYWOOD'S HEIRS *vs.* MOORE.

Haywood conveyed to his daughter Harriet and her assigns forever, land in consideration of \$1000 paid him, to be held during her natural life, and after her death, to such of her children, their heirs and assigns forever, as she and her first husband should direct, limit and appoint, and for want of such joint appointment to all her children equally, their heirs and assigns forever: Held,

1. That this deed vested in Harriet an estate for life with remainder over.
2. That upon the birth of a son the remainder became vested in him, subject to be divested by the birth of other children, or by the exercise of the power of appointment.
3. That the consideration expressed in the face of the deed must be regarded as the true and only consideration moving to the execution thereof, in the absence of evidence to the contrary; and that the land must therefore be regarded as purchased by the mother, the life estate for herself, and the remainder for her children.
4. That said remainder having been purchased by the mother for the child, and conveyed to him directly, was therefore derived from the mother within the meaning of the act of 1784, ch. 22, sec. 7, and consequently, upon the death of the son, intestate, without issue, vested in the mother, thus uniting the life estate and remainder and giving her a fee simple.
5. That the mother having died, intestate, without issue, the estate descended to her brothers and sisters.

This bill was filed in the chancery court at Pulaski, in February, 1837, by the heirs of the late Judge Haywood, against David Moore, to obtain a decree, among other things for a tract of land containing three hundred acres, lying in Giles county, and in the possession of Moore. On the 29th day of June, in the year 1808, John Haywood made a deed to his daughter Harriet Haywood. This deed set forth that said Haywood "for and in consideration of \$1000, to him in hand paid, the receipt of which he doth hereby acknowledge, hath given, granted, bargained and sold, delivered, enfeoffed and confirmed, and by these presents doth give, grant, bargain, sell and deliver, enfeoff and confirm to the said Harriet the one half," &c., "also 300 acres of land, on Richland creek of Elk river," &c.; "to have and hold the said tracts of land for and during the term of her natural life, and after her death to such of her children, their heirs and assigns forever, as she and her first husband shall direct, limit and appoint, and for want of such joint appointment, to all her children equally, their heirs and assigns forever."

[Haywood's heirs vs. Moore.]

On the day after the execution of this deed, Harriet Haywood intermarried with defendant Moore. Within the first twelve months after the marriage, Mrs. Moore gave birth to a son. The weight of the testimony taken in the cause sustains the position that this child was born alive and lived several hours and died. There was also testimony going to show that the child was born within six months after conception, and that its premature birth was occasioned by an injury received by the mother by a fall from a horse.

Mrs. Moore, having had no other children, died in 1831, leaving brothers and sisters, who are the complainants in this bill. The bill charges, that the land "was settled upon the said Harriet by an instrument or marriage article, or by a deed or deeds of gift, or in some other way upon the following terms and conditions, and no other; that is to say, that if the said Harriet should die without issue, then and in that event the said property" was to go to and be the property of the brothers and sisters of the said Harriet; in pursuance of which said settlement the said D. Moore and his wife took possession of the property.

The bill prays that the property may be decreed to the complainants, the heirs aforesaid. The answer of Moore asserts a claim of right in fee simple to the land "by virtue of the deed and the birth of a child," and that if he was not entitled thereto in fee simple, he was to a life estate therein as a tenant by the courtesy.

The cause came on to be heard at the September term, 1841, before Bramlett, chancellor, who decreed that the complainants were entitled to the land. The defendant appealed.

This case was argued by Mr. Brown and Wright for the complainants and Mr. Goode and Fogg for the defendant.

GREEN, J. delivered the opinion of the court.

This bill is filed by the heirs of John Haywood, deceased, for the recovery of certain lands and slaves, which were conveyed by Judge Haywood to his daughter Harriet, afterwards Mrs. Moore, wife of the defendant David Moore. The deed was executed the 29th day of June, 1808, expressing the consideration of one thousand dollars. By it several slaves and tracts of land were conveyed, and among the rest a tract of three hundred acres on Richland creek of Elk river.

[Haywood's heirs vs. Moore.]

The negroes were given to Harriet and her assigns forever, but the land was to be held, "for and during the term of her natural life, and after her death to such of her children, their heirs and assigns forever as she and her first husband shall limit, direct and appoint, and for want of such joint appointment, to all her children equally, their heirs and assigns forever."

1. The first question is, what estate was vested in Harriet Haywood by this deed? There can be no doubt but that she took an estate for life only. The terms of this deed do not fall within the rule in Shelly's case. Although the word, "children," is sometimes used to denote the entire class of persons who are to take in succession, and in such case, is synonymous with the word, "heirs;" yet generally, the word "children," is used as a word of purchase. In the deed now before the court it is evidently so used. The estate is to go to such of her children as she may appoint, and in default of appointment, to all her children, equally, and their heirs. The meaning is, children living at her death.

2. Did Harriet have issue capable of inheriting? This depends upon the evidence in the cause; and we think the proof is satisfactory, that she did give birth to a son, who lived several hours. There is no satisfactory evidence, as to the period of gestation at which the child was born, nor do we deem it necessary to enter into that enquiry. The fact that the child was born alive, is all that the common law requires, in order that it may inherit and transmit the inheritance.

3. It becomes necessary next to enquire, what estate this child took under the deed? The terms of the deed convey to Harriet an estate for life, with contingent remainder over; (Ferne 9,) but upon the birth of her son, the remainder became vested in him, subject to be divested by the birth of other children, or by the exercise, by Harriet and her first husband, of their power of appointment. Ferne, 228, et seq: 4 Cruise's Dig. 166. sec. 44:

4. As the child of Harriet died shortly after its birth, its father, the defendant Moore, and its mother the said Harriet, both surviving, the next question is, to whom, by our statutes, did the estate go, which was vested in the child?

The deed from Judge Haywood to Harriet, as we have seen, purports to have been made for the consideration of one thousand dollars to him paid by Harriet. Formerly it was held, that, against a consideration alleged in a deed, no averment to the con-

[Haywood's heirs vs. Moore.]

trary could be received. 4 Cruise's Dig. 269. But in modern times parol evidence of collateral facts, tending to support or explain a deed, has been admitted. 4 Cruise's Dig. 269, sec. 49. Unquestionably, however, the consideration expressed in the deed, must be taken to be the true and only consideration moving to the execution of it, unless there is evidence to show that there were other considerations than the one expressed. In this case, no such evidence exists. It is suggested by the counsel that the statements in the bill, and answer and the letters of Judge Haywood, show that the property conveyed in this deed was in fact given by Judge Haywood to his daughter. In this, however, the counsel is mistaken. The bill speaks of it as a settlement, but never as a gift.

It is also apparent from the bill that the complainants had no precise knowledge of the nature of the conveyance. The answer does not call it a gift. It admits that Judge Haywood conveyed by deed to his daughter the property in question; but whether it was by a deed of gift, or a deed of bargain and sale, it does not say. The letters of Judge Haywood, in this record, do not allude to this deed. Some reference is made to the deed of 1815, but none to the one of 1808.

But it is said, that the estate conveyed, is of such magnitude, as to prove that a thousand dollars was an wholly inadequate consideration, and, therefore, we must infer it was a gift. In the first place, we cannot know that one thousand dollars was an inadequate consideration. We have no evidence of the description of the property, or of its value in 1808. Nor in the next place, is it necessary, in order to constitute a valid purchase, that a full price should be paid. We must take it therefore, that the sum of a thousand dollars was paid by Harriet Haywood, to her father, for the property conveyed to her, by the deed under consideration. And we cannot understand this sum, as having been given for the life estate, and that the remainder to her children was a donation from her father. It is in consideration of the thousand dollars that he conveys, and that consideration relates as well to the remainder as to the life estate. Taking this to have been a purchase by Harriet for the benefit of her children, is not the title of her child to the remainder, derived from her? We think it is. If a parent purchase a tract of land from a third person for his child, and cause the deed to be made from the vendor to the child, that is

[Haywood's heirs vs. Moore.]

an advancement from the parent, which must be brought into hotch-pot, upon a division of the parent's estate. *Thompson vs. Thompson*, 1 Yerg. 97. If it is an advancement by the parent, is it not derived from him? The word *derived*, used in the act of 1784, ch. 22, sec. 7, is not a technical word. It means, if the land proceed from either parent, by which either a legal or equitable title is vested in the child, if he should die without issue, or not having any brother or sister, or the lawful issue of such, who shall survive, the estate of such intestate shall be vested in fee simple in the parent from whom the same was so derived. If a parent give a land warrant to a child, or assign a title bond, and the grant in the one case or the deed in the other, be made directly to the child, the land so obtained is derived from the parent, within the meaning of this act of assembly; and on the death of the child, under the circumstances mentioned in the act, would vest in such parent. We think, therefore, that upon the death of her son, the estate was vested in Mrs. Moore, in fee simple.

As Mr. Moore had no child after the fee was vested in her, the defendant cannot hold the land as tenant by the *courtesy*. One requisite to constitute a tenancy by the courtesy is, that the wife have issue, capable of inheriting her estate. Therefore, "if a woman be tenant in tail male, and hath only a daughter born, the husband is not thereby entitled to be tenant by the courtesy; because, such issue female, can never inherit the estate in tail male." 2 Black. Com. 127-8. Here Mrs. Moore never had issue capable of inheriting this estate, because she became seized of the fee after the death of her son and after being thus vested with the estate, she had no child born. The consequence of the foregoing view of the case is, that upon the death of Mrs. Moore, her brothers and sisters or their issue were entitled to this land. All the land mentioned in the deed having been sold in the life-time of Harriet, except the 300 acre tract on Richland creek, the complainants are entitled to that tract only. Let the decree be affirmed.

HUGHES vs. CANNON.

1. The legislature have the power to pass laws for the purpose of curing the defective probate and registration of deeds, under previously existing laws; the solemnities which are required to evidence the transfer of property, affecting the remedy and not the rights of the parties.

2. A limitation in remainder of personal chattels by deed is good in Virginia and Tennessee.

3. The case of *Baldwin vs. Baldwin*, (see *ante* page 473,) referred to and approved; also *Morgan vs. Elam*, 4 Yerg. 375.

4. Winn loaned by deed and delivered a slave to Hughes and wife, to be and remain in the personal service of the wife during the life of the wife, and after her death to go to such child or children or heirs surviving at the death of the wife as might have attained or might attain the age of 21 years: Held, that such deed conveyed to the wife a valid life estate, with remainder to her son who attained the age of 21 years, the said deed not falling within the rule in *Shelly's* case.

William Hughes married Mariah, the daughter of O. Winn, in the county of Lunenburg, State of Virginia, in the year 1815. In 1817, being about to remove to the State of Tennessee, Winn placed in the hands of Hughes and wife a slave named Jack, the subject of the present controversy. At the time of the delivery of this slave a deed was made in reference to him, the contents of which are as follows: "I, the said O. Winn, do hereby deliver to said William Hughes and Mariah, one negro boy named Jack, on the following terms and conditions, namely, that the said negro remain in the personal service of said William Hughes and his wife, not subject to the payment of any debt of said William or Mariah, or to be taken by any contract of said Hughes of whatsoever nature, and if the said Mariah should die, leaving no heir of her body, then the said negro Jack shall be returned to the said O. Winn and his heirs; and in case the said Mariah should die leaving an heir or heirs of her body, and the said heir or heirs should die before they come to the age of twenty-one years; and in case they leave no heir of their bodies, then the said negro shall be returned to said Winn or his heirs; but in case the said Mariah shall have a child or children, and die leaving said child or children surviving after her death, and her child or children shall have no heirs of their bodies or arrive at the age of twenty-one years, then I, the said Orsemus Winn do lend to said William Hughes and Mariah his wife, the said negro during the natural life of said Mariah, and after the death of said Mariah, I, the said O. Winn, do give and be-

[Hughes vs. Cannon.]

queath to the said child or children of Mariah, if any should arrive at twenty-one years of age or leave heirs of their bodies, the aforesaid negro to have and hold forever, and in case the said William and Mariah will receive the said negro on the aforesaid conditions, I, the said O. Winn do hereby warrant and defend the right of said negro to said William and Mariah during the natural life of said Mariah, and then to the supposed heir of said Mariah on the above conditions, against the claim of all persons," &c.

On the back of this deed was written the following agreement, which was signed by William and Mariah Hughes and sealed by them, to wit:

"We, the said William and Mariah Hughes, do hereby acknowledge we have received the above named negro on the above written conditions, and do bind ourselves and our heirs to comply with the conditions in the sum of one thousand pounds current money of Virginia, in witness," &c.

The following is the probate of these instruments, to wit: "In Lunenburg clerk's office, 24th January, 1817, the foregoing writing was proved as to O. Winn by the oath of Edward Winn, a subscribing witness thereto; and the condition thereunder written, signed by W. and M. Hughes was proved by the oaths of Edward Winn and W. M. White, two of the subscribing witnesses thereto, which were severally ordered to be recorded.

W. H. TAYLOR, Clerk."

William Hughes brought the slave to the State of Tennessee and retained possession of him until about the year 1825, when Hughes sold him to one Townsend for the sum of \$400. The possession was delivered and a bill of sale signed by Hughes and wife made and delivered to Townsend. Townsend died, and in the distribution of his estate the slave was allotted to a son-in-law, Winn, and by Winn sold to A. Cannon for a valuable consideration, without notice of any outstanding claim to the slave.

This bill was filed in the chancery court at Murfreesborough on the 9th day of July, 1838, by Mariah Hughes and Edward Hughes her son and only child against Cannon.

The bill asserts a right to a life estate in the slave in behalf of Mariah Hughes, with remainder to Edward after the determination of the life estate, under the provisions of the deed made by O. Winn in 1817. The bill prays that Mariah Hughes have a decree for the immediate possession of the slave, or that Edward (if entitled there-

[Hughes vs. Cannon.]

to) have decreed to him the possession as he was now more than twenty-one years of age.

The complainant Edward alleging that he was entitled to the possession of the slave after the determination of the life estate of his mother, at all events, and that he was apprehensive that the slave would be removed beyond the jurisdiction of the court, prayed that his remainder interest might be secured by the intervention of the court.

The defendant answered the bill, and the cause came on to be heard on bill, answer, replication and proof (the complainant Mariah having died in the meantime,) at the July term, 1841, Ridley, chancellor, presiding. He being of opinion that Cannon had no right to take advantage of the non-registration of this deed in this State, not being a purchaser from the grantor, and that the deed conferred a valid life estate on Mariah Hughes, and after her death an absolute estate to her son Edward, decreed the possession of the slave to said Edward, and hire from the death of Mariah. The defendant appealed.

H. M. Burton, for the complainant. The grounds of defence relied on are, 1. That the bill of sale from O. Winn has not been proven and registered according to "our law" (the law of Ten.) To this it is answered that the *lex loci* governs as well in relation to the authentication of contracts as in regard to their construction and effect. Story's Com. on Conflict of Laws, (2nd Ed.) page 524-26: 4th Kent's Com. Nor does the fact that the bill of sale was made in contemplation of a removal to this State alter the case. *Orenshaw vs. Anthony*, Mar. & Yer. page 102: *Loving vs. Hunter*, 8 Yerger, page 4. The laws of Virginia, (the bill of sale having been executed there,) then govern in regard to the registration. And by our act of 1839-40, this court may take notice of them judicially. By the act of 1792, of Virginia, which appears to have been in force at the date of the execution of the deed, a deed of gift of slaves was required to be registered only in cases where the donor retained the possession. Rev. Stat. of Va. vol. 1, page 269: *Moore vs. Ducaney*, 3d Henning & Munford's Rep. page 139. It is then sufficient that the execution of the deed is proven as at common law, which is done by the witness, William Hughes. But the deed of gift is registered in Lunenburg county, Virginia, and has endorsed upon it the certificate of the clerk that

[Hughes vs. Cannon.]

it was duly proved. And the objection that the clerk does not give a copy of the order admitting it to probate, but merely certifies that it was duly proven, cannot now avail. That defect is now cured by our act of 1839-40, on the subject of registration.

2. It is objected that the limitation amounts to a perpetuity. A perpetuity is defined by Sir Ed. Sugden to be such a limitation of an estate as renders it unalienable beyond the period allowed by law. And property may be, by our law, rendered unalienable for any number of lives in being, and twenty-one years and a fraction of a year thereafter. 4th Kent's Com. page 267.

3. That the sale by Wm. and Mariah Hughes, purporting to convey a greater estate than they possessed, operated as a forfeiture, and there then being no particular estate to support the remainder, it was gone. This would have been so at common law, but our statutory deeds do not operate, as an ancient fœffment, to pass the fee simple into rights of entry or action. But they operate only as grants to convey what the bargainor may lawfully sell. *Miller vs. Miller*, Meigs' Rep. page 484.

4. Adverse possession and the statutes of limitation are relied on. But this would involve the absurdity that the statute began to run before the right of action accrued. Edward Hughes, the present complainant, could have commenced no action to recover the possession of the slave in question before the death of his mother in the month of September, 1838. And the bill was not filed on behalf of the present complainant, to obtain the immediate possession of the slave; but to protect his right as remainderman, which he might well do, he then having such an interest as a court of equity will protect. *Henderson vs. Vaulx*, 10th Yerger's Rep. And the court, once having jurisdiction of the cause, would not drive him into a court of law after the death of his mother, but would proceed to do justice between the parties.

5. That there was no delivery of possession to Edward Hughes or to any one for him. The possession of the tenant for life is the possession of the remainderman. Coke on Litt. And moreover where the gift is evidenced by writing, possession is not essential to its validity. *Caines vs. Marley*, 2 Yerger's Reports, page 182.

6. That Cannon was a *bona fide* purchaser without notice. Whatever Cannon's equity may be, that of Hughes is at least equal to it; and in addition he has the legal title and could successfully prosecute his action of *detinue* or *trover* for the recovery of the

[Hughes vs. Cannon.]

slave, but that this court retains jurisdiction of the case to prevent circuitry of action.

7. The counsel for the defendant relies with much confidence on the position, "that a contingent remainder cannot be created by deed;" and the cases in 3 Dev. N. C. Rep. page 262, and in 2 Murphey, are relied on in support of the position. This was true at an early period of the Common Law, but it is not so at this day. 4th Kent, page 352. The North Carolina decisions followed the old common law doctrine, until corrected by statute, (see Rev. S. of N. C. ch. 37, sec. 22,) and by the decisions of that State neither a vested or contingent remainder could be created by deed. *Graham vs. Graham*, 2 Hawks' Rep. 322, and *Foscue vs. Foscue*, 3 Hawks, 358. And the reason of the rule stated in the argument of the first of these cases by Mr. Ruffin, (now one of the judges of the supreme court of North Carolina,) and upon which the court seems to have decided the case, applies with equal force to either a vested or contingent remainder created by deed.

But, by the decisions of our own State, a vested remainder may be created by deed. *Johnson vs. Mitchell*, 1st Humphreys' Rep. 173: *Caines vs. Marley*, 2 Yerger, 552. And why not a contingent remainder? It is not the uncertainty of the enjoyment of an estate in future, but the uncertainty of the right to that enjoyment which constitutes the difference between a vested and contingent remainder. 4th Kent, page 206: *Fearne on Rem.* page 3. Now if there be any sound reason in the common law rule in either case, it is in the perishable nature of personal property, and not in the right of enjoyment, and it would apply with equal force to both. If it applies not to a vested, then it cannot apply to a contingent remainder.

The decisions of the supreme court of Virginia, are of the highest authority in this case, the deed of gift having been executed in that State, and the *lex loci* governing in its construction and effect. The case of *Higgenbotham vs. Rucker*, 2 Call's V. R. p. 313, is directly in point, and decides that a contingent remainder may be created by deed. The same principle is also directly decided in the case of *Keen vs. Macey*, 2 Bibb's Ken. Rep. page 39, and on the authority of the decision of the former case. It may here be remarked that the decisions of the supreme court of Kentucky, in any case governed by the laws of Virginia are of scarcely less authority than the decisions of the latter State themselves, having,

[Hughes vs. Cannon.]

when she ceased to be part of her territory and became an independent State, adopted the laws of Virginia for her government.

8. It is further argued that the limitation falls within the rule in Shelly's case. The word "heirs," though technically used as a word of limitation, may be so restricted as to be descriptive of particular persons, and therefore words of purchase. Law Lib. Ancestor & Heir, page 36-7, and annexed table of cases. They are frequently so used. 6 Yerger, 103.

Where it appears to be the intention that the first taker should have a life estate only, the word "heirs" is construed to be a word of purchase. *Hodgson vs. Bussey*, 2 Atkins: *Hickman vs. Ellison*, 2 Vernon, 195: Archer's case, 1 Coke's Rep: *Peacock vs. Spooner*, 2 Vernon, 362: Fearne on Rem. 149, 210. In the case of *Hickman vs. Quinn*, the words "loan to my daughter during her natural life" seem to have taken the case out of the rule. In *Loving vs. Hunter*, the words "loaned to my daughters during their natural lives, and then to the heirs," &c., was determined not to fall within the rule.

The intention of the grantor, (Orsemus Winn,) as is apparent from the face of the instrument, is clearly that Wm. and Mariah Hughes should have a life estate for the life of the latter in the slave in question, with remainder over to the child or children, if any there should be of the said Mariah surviving her, when they should arrive at twenty-one years of age, or if dying before that time to such children as they should have remaining. This intention is apparent, first, from the use of the words loan for the life of the said Mariah; second, by exempting the slave in the deed from any debt the said Wm. or Mariah might contract; third, by the super-added words, child or children. And where the intention is apparent, the courts will carry out that intention unless it contravene some positive rule of law. *Smith vs. Bell*, 6 Peters' Rep. 68.

Mr. E. A. Keeble argued this case for the defendant at length. The reporter was not furnished with his brief.

REESE, J. delivered the opinion of the court.

In 1817, William Hughes and Mariah Hughes his wife, were about to remove from the State of Virginia to this State. The father-in-law of Hughes, one Orsemus Winn, placed in their possession a negro boy Jack, the subject of this controversy. At that

[Hughes vs. Cannon.]

time the document exhibited with the bill, was executed by Winn. As to that document two considerations arise, first, is it before us as evidence? secondly, what is its legal operation? It is not admitted in the answer, yet it is not strongly put in issue. And William Hughes, a witness in the cause says, that upon the names of the witnesses being read to him, he remembers that he signed the paper; he was ignorant however of its contents. The paper is recorded in the county of Lunenburg, Va., and the clerk of that county, not giving a copy of the record of probate, certifies that it was duly proved according to law. This probate, before our registration act of 1839-40, would have been held insufficient. It is good by the terms of that statute. But it is said that a certificate of probate, which before that statute could not have been registered, cannot now be received; that to permit it, would give to the act an operation violative of the constitution. To this proposition we are unable to yield our assent. Registration laws are founded upon reasons of public policy. By them it is intended that certain instruments, evidencing a transfer of property shall be made known and be subject to public inspection, and also, that the proof of their existence shall be perpetuated. The solemnities of their execution and authentication, may be as many, or as few, and of that precise character, which the legislature may prescribe. The subject is within their competency. And whether their provisions relate to the future or the past, they affect the remedy and not the right.

Upon this ground then, if it were necessary to resort to it, we think the instrument in question is before us in evidence? 2nd. What is its legal effect? The instrument is most inartificially drawn. It states, that "the said O. Winn doth hereby *deliver* to the said William and Mariah his wife, one negro boy named Jack, on the following conditions, namely, that the said negro remain in the personal possession of the said Wm. Hughes and Mariah his wife, not subject to the payment of any debt of the said Wm. Hughes or Mariah, nor to be taken by any contract of said Wm. Hughes, of what nature or kind soever; and if the aforesaid Mariah shall die leaving no heir or heirs of her body, then the said negro shall be returned to the said O. Winn and his heirs, and in case the said Mariah shall die, leaving an heir or heirs of her body, and the said heir or heirs, shall die before they come to the age of twenty-one, and in case they leave no heir of their body, then the said negro

[Hughes vs. Cannon.]

shall be returned to the said O. Winn or his heirs. "But in case the said Mariah shall have a child or children and die leaving said child or children surviving after her death, and her child or children should have heirs of their body or arrive to the age of twenty-one years, then I, the said O. Winn, doth *lend* to the said Wm. Hughes and Mariah his wife, the said negro during the natural life of the said Mariah, and after the death of the said Mariah, I, the said O. Winn, do give and bequeath to the said child or children of the said Mariah, (if any of them should arrive to the age of twenty-one years of age, or leave heirs of their body) the aforesaid negro to have and to hold forever."

Stripping this document of the clauses inserted with such solicitude by the grantor to create a reversion in himself, and it imports that Winn had delivered and loaned to Hughes and wife, the negro to be and remain in their service, for and during the natural life of the wife, and that then and after the death of the wife, that he gave him to such child or children of hers surviving at the time of the death of the wife as might have attained or might attain the age of twenty-one years, &c.

The very statement shows that it does not fall within the rule of Shelly's case. The general intent is not to limit the reversion even upon an indefinite failure of issue. The particular intent is to give to the first taker only a life estate; this is manifested by the terms "deliver" and "lend" for her natural life. The remainder is given by different terms, and as a separate, and as it were, independent donation to the child or children of the wife surviving at her death. These are the very terms appropriate to exclude a case from the operation of the rule in Shelly's case. The remainder is vested in the child or children, living at the death of the wife, contingent, however, upon their arrival at the age of twenty-one years, or if dying before that time, upon their leaving children then surviving.

In the case before the court, the tenant for life, had one child born, the complainant, and he reached the age of twenty-one before the termination of the life estate.

As to whether a limitation in remainder of a personal chattel, can take effect, it is not an open question.

It is now, in despite of contrary opinions early entertained, a well settled point that such limitation is good. As to the other question, relating to the non-registration of the deed in this State,

[Taylor vs. Taylor.]

the case of Morgan and Elam, and the case determined at the present term of *Baldwin vs. Baldwin*, and other cases and decisions, settle, that in Virginia as well as in this State, under the statutes applying to this instrument, the want of registration avoids the deed as to creditors of, and the purchasers from, the grantor only. Upon the whole case we are of opinion, that the decree of the chancellor ought to be affirmed.

TAYLOR, et als. vs. TAYLOR.

Taylor made a sealed instrument, by the terms of which he gave to his son certain slaves. It was witnessed and deposited in his trunk, with a declaration, that it should take effect after his death, and not before. It there remained till his death: Held,

1st. That this instrument could not be set up as a deed of gift, delivery being essential to constitute a deed.

2nd. That not having been offered and proven in the county court as a testamentary paper, it could not be regarded as such.—Under such circumstances, the court will permit the cause to continue open for further decree in the chancery court, if the parties choose to attempt to establish the paper writing as a will.

Taul, for complainants.

Venable, for defendants, cited the following authorities, 1 Wm.'s on Ex'rs, 54: 2 Hag. 103: 3 Ves. Jr. 231: 1 Ves. Sr. 127: 2 Ves. Sr. 591: 1 Phil. 1: 3 Phil. 405: 1 Phil. 28, 62: 3 Phil. 181: 5 Ves. 280: *Watkins vs. Dean*, 10 Yerg. Rep. 321: 2 Dev. & Bat. Eq. Rep.

GREEN, J. delivered the opinion of the court.

This bill is filed by the complainants, children of James Taylor, jr., deceased, against the defendants, their brothers, to set aside certain deeds, from the said James, to each of his sons, under and by virtue of which they claim his property.

As to the deed to James Taylor, jr., one of the defendants, dated in 1834, and proved and registered in 1838, in the life-time of the donor, we think there exists no ground of objection. The whole body of evidence negatives the charge of imbecility of mind, so as to disqualify the donor from the capacity necessary to enable him

[Taylor vs. Taylor.]

to make a valid deed; nor do we think there is any ground for the charge of circumvention and fraud.

But the deed of gift to Samuel, for the two negroes, Patty and David, the bill of sale to William, for the four negroes, Jennet, Nancy, James and Mary, and the deed of gift to Alden, of the two small tracts of land were never delivered as deeds to the parties claiming under them.

Upon this subject, the evidence is as clear and unquestionable, as it is, that the old man was capable of making these deeds, and was uninfluenced by any circumvention or fraud on the part of his sons. These deeds were not intended by him to take effect during his life-time. He signed and acknowledged them before witnesses, and had them deposited in his trunk, in his own house, to be there kept until after his death, when he said each man could get his own. He told several witnesses, that he did not intend to give the staff out of his own hand during his life. The fact of the non-delivery of these deeds being unquestionable, it is clear they cannot take effect *as deeds*.

But the defendant's counsel insists, that if they are not deeds, they are valid as testamentary papers. This may possibly be true, at least as to one of them, but that question is not *now* before the court. They have never been propounded and admitted to record as testamentary papers, in the proper forum. Until this is done, they cannot be so regarded.

But as their validity in this point of view is insisted on—this court will content itself with declaring their invalidity *as deeds*, and permit the case to continue open for further decree in the chancery court, until the parties have time to take such steps to establish these papers as a will, should they be so advised.

INDEX.

ABATEMENT.

See JURISDICTION.

ACCEPTOR.

See NEGOTIABLE PAPER.

ACCOUNT.

See PARTNERS. *Hunt & Co. vs. Benson*, 459.

ACTION.

1. The action for assault and battery is a transitory action, and not local in its nature. *Rich vs. Rayle*, 404.
2. The action of trespass *quare clausum fregit* is a local action, and proof must be made, that the injury was done in the county, and verdict does not cure deficiency of proof on this point. *Roach vs. Damron*, 425.
3. See ASSUMPSIT, CASE, DEBT, DETINUE, EJECTMENT, TROVER, TRESPASS.

ADMINISTRATOR AND EXECUTOR.

1. Letters of administration granted in a county in which the deceased did not reside at the time of his death, are void.
2. The widow is not the next of kin to her deceased husband.
3. Letters of administration are not void because another may have a superior title to them by law.
4. The circuit court has no power to repeal letters of administration granted by the county court, unless the party seeking the repeal of them had appeared in the county court and contested the grant. The proceeding to repeal the grant must originate in the county court. *Wilson vs. Frazier & McKinney*, 30.
5. Notice of the non-payment of a note, the endorser being dead, should be transmitted to his personal representative.
6. Where the notice was duly transmitted to the usual place of residence of the endorser, under the belief that he was alive, when in fact he was dead: Held, that such notice was sufficient. *Planters' Bank vs. White*, 113.

ADMINISTRATOR AND EXECUTOR.—*Continued.*

7. See LIMITATION, 9, 10.
8. Executors and administrators liable to the legatees and distributees respectively for bank stock of the deceased converted, at its value at the time of conversion, with interest from the same date. *Jameson vs. Shelby*, 198.
9. John Keaton died in Missouri, having some personal property in that State, and some in the possession of his family in the State of Tennessee; W. Keaton administered on his estate in Tennessee, and gave sureties for the performance of this trust in Tennessee; he then went to Missouri, obtained letters of administration upon the estate of decedent in that State, and gave sureties for the performance of that trust: Held, that these trusts were distinct and independent of each other, and the sureties in one State not responsible to the distributees for the effects received into possession in the other; and this is so, though the administrator may have brought the property obtained in Missouri to Tennessee, converted it into cash, and made a return of the proceeds to the appropriate tribunal in Tennessee as assets. *Keaton's distributees vs. Campbell, et als.* 224.
10. The voluntary payment of a debt to a foreign administrator is a good payment, and discharges the debtor. *Ibid.*
11. How the securities of an administrator may be discharged and to what extent, upon petition to county court. *Harrison, et als. vs. Turbeville, et als.* 252. *Polk vs. Wisener, et als.* 520.
12. The maker of a note was executor of the endorser: Held, that notice that holder would look to the estate for payment was necessary. *Alton, Dewy & Tailor vs. Robinson*, 341.
13. *Devastavit* committed by payment of debt barred by statute of limitations. *Pucket vs. James*, 565.
14. The father is the next of kin to his deceased children, who had no issue, and in case of their dying intestate and without issue, he inherits their personal estate.
15. Pinkard conveyed to his three children certain slaves; two of the children died intestate and without issue. Coleman obtained judgment against Pinkard, and *fi. fa.* thereon was returned, *nulla bona*. Coleman administered upon the estates of the deceased children, and filed his bill, praying a partition and subjection of the estates of the deceased children to his debt: Held, that he was entitled thereto; but the father having sold one of the slaves and appropriated the proceeds, Coleman, standing in his shoes, must account for the price of the slave sold, before he shall have partition of those remaining.

ADMINISTRATOR AND EXECUTOR.—Continued.

16. Coleman, a judgment creditor of Pinkard, and administrator of Oliver and Angelina Pinkard, deceased, filed his bill, claiming distributive shares of certain slaves conveyed by Pinkard to his children, Oliver and Angelina P., by deed, and the subjection of the distributive shares to the payment of his debt; and also filed his bill, alleging that such deed was fraudulent and void: Held, that the claims set up in the amended bill were directly at war with those set up in the original bill, and the amended bill must be dismissed. *Coleman vs. Pinkard*, 184.

ADVANCEMENT.

If a parent purchase property from a third person, and cause it to be conveyed directly by the vendor to the child, it is an advancement. *Haywood's heirs vs. Moore*, 588.

AGENT.

1. A party may recognise the authority of an agent after the completion of a transaction as well as before, 308.
2. The death of the principal is a revocation of the authority of an agent, unless the power be coupled with an interest. *Rigs vs. Cage*, 350.

AGREEMENT.

See VENDORS and PURCHASERS.

ALIEN.

Persons of foreign birth resident in the State of Tennessee, but not naturalised, have capacity to inherit personal estate in Tennessee, the term "alien," in the act of 1809, ch. 53, being intended by the legislature to mean foreigners by residence as well as birth. *Polk vs. Ralston*, 537.

ANSWER.

1. Answer of a corporation, not being on oath, may be overturned by one witness. *Van Wyck vs. Norvell and Union Bank*, 193.
2. Where the answer sets out a state of facts which entitles the complainant to a decree, the court will render it, though such facts be not charged in the bill. *Jameson vs. Shelby*, 198.

APPOINTMENT.

See WILL, 2, 11, 12, 13.

APPRENTICE.

1. An indenture of apprenticeship, whether made under the statute or by the parent or guardian, if assigned or transferred, does not bind the apprentice to yield obedience to the assignee or transferee.

APPRENTICE.—Continued.

2. The statute of 5th Elizabeth is not in force in this State.
3. Where a father binds his infant son an apprentice by covenant, and the son neither joins in the covenant nor dissents therefrom, but performs the stipulated services: Held, that it is not important whether the son was bound to perform the services or not, having rendered them, the master is liable in damages for his breach of the covenant.
4. Can a father at common law bind his infant son an apprentice, without his assent, testified by his execution of an indenture? *Stewart vs. Rickets*, 151.

ARBITRATION.

Where a cause depending in court is submitted to arbitration by a rule of court, and the award is to be made the judgment of the court, this submission to arbitrators does not operate as a discontinuance of the cause. *Bridges vs. Vick*, 516.

ASSAULT, FELONIOUS.

1. Assault by a slave with intent to commit murder in the first degree. See **CRIMINAL LAW**. See p. 451.
2. Assault by a slave with intent to ravish a white woman. See **CRIMINAL LAW**. See p. 451.
3. Assault with intent to commit murder in the first degree. See **CRIMINAL LAW, FELONY**. See p. 439.

ASSAULT, NOT FELONIOUS.

1. Assault by a parent upon his child. *Johnson, et ux. vs. The State*, 283.
2. Assault by drawing an empty pistol and threatening to shoot. *State vs. Smith*, 457.

ASSUMPSIT.

1. The action of assumpsit is maintainable whenever the money of one man has got into the pocket of another without consideration. *Cocke vs. Porter's ex.* 15.
2. Cocke having a decree against Porter for one thousand seven hundred and eight dollars and ninety-two cents, on the 10th of August, 1831, drew a draft on Porter in favor of Carter for nine hundred and eighteen dollars and forty cents. On the 12th Porter paid one thousand dollars to the clerk; at the same time the clerk, by direction of Cocke's attorney, received the promissory note of a third person for the sum of three hundred and thirty-one dollars and forty four cents, upon condition, that when collected the proceeds should go in discharge of the decree. Carter's agent received this note at the same time upon the condition, that

ASSUMPSIT.—Continued.

- when collected the proceeds should go to the discharge of the draft: Held, that the note being paid to Carter, was *pro tanto* a payment of the draft and of the decree; and that Cocke having disregarded the act of his agent in the reception of the note, and having collected the balance of the decree by *fi. fa.* was liable to Porter in assumpsit for the amount thereof. *Cocke vs. Porter*, 15.
3. Williams sold to Hurt a jackass for fifteen hundred dollars, of which five hundred were paid at the time of purchase, and note executed for the balance; Williams executed a bill of sale to Hurt, in which the jack was warranted to be as sure a foal-getter as common for jacks. Hurt became dissatisfied with the jack and proposed to return him. It was then agreed that Hurt should make a further trial of the jack, and if half the mares put to him should not prove with foal, then it should be optionary with Hurt whether he should return him or keep him and pay five hundred dollars. The jack failed, was returned and accepted by Williams: Held, that the return and acceptance of the jack vacated both contracts, and that Williams was liable in assumpsit for the five hundred dollars paid.
 4. Where there is a sale with warranty, or if by the special terms of the contract the vendee is at liberty to return the article sold, an offer to return it is equivalent to an offer accepted by the vendor, and in either case the contract is at an end. *Williams vs. Hurt*, 68.
 5. Nuckolls rented a room to an association of individuals, at six dollars per month, for the purpose of performing plays. After this contract Barry became a member of the association, and as such, used and occupied the room: Held, that Barry was not liable for the rent, before or after he became a member, upon a count on the special contract, or upon a count in *indebitatus assumpsit* or *quantum meruit* for work and labor done. *Barry vs. Nuckolls*, 324.
 6. To permit proof to be received under the plea of non-assumpsit, that an endorsement is not genuine, is in violation of the act of 1819, ch. 42, sec. 1, unless such plea be accompanied with an affidavit of the truth thereof. *Knott vs. Planters' Bank*, 493.
 7. Assumpsit against endorser. Right of plaintiff to strike out the name of the endorsee and insert his own. See *Union Bank vs. Carr*, 345.

ATTACHMENT FOR CONTEMPT.

1. In cases at common law a party arrested for contempt will be discharged if by his answer to interrogatories filed he

ATTACHMENT FOR CONTEMPT.—Continued.

make such a statement as will free him from the imputed contempt, and testimony contradicting such answer will not be heard. *Underwood's case*, 46.

2. In cases in chancery, however, the rule is different. The answer of the defendant, denying the contempt is not conclusive and does not necessarily entitle the defendant to his discharge; the truth of the answer may be examined into and the action of the court regulated in accordance therewith. *Ibid.*
3. These principles are not changed by the provisions of the act of 1801, ch. 6, sec. 22, 23. *Ibid.*

ATTACHMENT, JUDICIAL.

The levy of a judicial attachment upon land, creates a lien upon such land which overreaches the lien of a judgment obtained subsequently, though the summons may have been previously issued, and previously executed. *Tappan vs. Harrison*, 172.

ATTACHMENT AGAINST ABSCONDING DEBTOR.

Plaintiff made affidavit that the defendant was justly indebted to him, and that the defendant was according "to the best of his knowledge and belief removing privately out of the county:" Held, that this affidavit was a good affidavit under the 19th section of the act of 1794, ch. 1, and authorised the issuance of an attachment against the effects of defendant. *Bank of State of Alabama vs. Berry*, 443.

AWARD.

See **ARBITRATION**.

BAIL.

1. Where a prisoner on bail in Tennessee to answer for murder was delivered by the Governor of the State to the agent of the Governor of the State of Alabama, it is held, that the bail was thereby discharged. *State vs. Allen*, 258.
2. See *Nicholson vs. Patterson*, 448.

BILL OF EXCHANGE.

See **NEGOTIABLE PAPER**.

BOND.

1. See **SHERIFF**. See **MOTION**.
2. The act of 1837, ch. 107, sec. 9, requires the cashier of the Bank of the State and its branches, to give bond with security for the performance of his duty, payable to the Governor of the State. Dale, cashier of the branch at Columbia, gave the bond payable to Newton Cannon, govern-

BOND.—Continued.

or, and his successors in office. Suit was instituted on this bond in the name of James K. Polk, governor of the State of Tennessee, for the use of the President and Directors of the Bank of Tennessee: Held, that when a statute directs bonds for the public benefit to be made payable to the Governor, or other functionary having legal succession, the office is the payee, and the successor, whether described, *eo nomine*, either in the statute or bond or not, may maintain the action, such officer being made by form of the statute, and for the public benefit, *quoad hoc*, a corporation sole. *Polk vs. Plummer*, 500..

3. Bonds and other deeds may be good in part and void for the residue, where the residue is founded in illegality, but not *malum in se*; and this is so, not only with regard to bonds or deeds containing conditions, covenants or grants not *malum in se*, but also with regard to those containing conditions, covenants or grants, illegal by the express provisions of statutes. *Ibid.*
4. The only exception to this rule, is where the statute has not confined its prohibitions to the illegal conditions, covenants or grants, but has expressly or by necessary implications annulled the whole instrument to all intents and purposes. *Ibid.*

BOUNDARY.

See PROCESSIONING. See 364, 285.

BYE-LAW.

See CORPORATION.

CAPTION.

A caption which does not state where the court was holden at which the conviction was had, or that a grand jury of good and lawful men was empannelled, is defective, and the judgment must be arrested for either of these causes. *Grandison vs. The State*, 451.

CA. SA.

1. See SHERIFF, 2, 3.
2. At common law, the execution must pursue the terms of the judgment, and if the judgment be against two, and execution against one, such execution is irregular, and on motion must be quashed. *Saunders & Martin vs. Gallaher*, 445. •
3. When a positive statutory provision has been enacted, the benefits of which cannot be all attained without a modification of, or departure from common law forms, that modification must be adopted, or departure made, to the extent

CA. SA.—*Continued.*

necessary to give effect to the legislative will, and, therefore, the act of 1831, ch. 40. sec. 5, which restricts the right to a *ca. sa.* to cases where an affidavit shall be made, &c., authorises the issuance of a *ca. sa.* against one of the defendants in a joint judgment. *Ibid.*

4. When a defendant in a *ca. sa.* is arrested and gives bond for his appearance, and in accordance with the act of 1824, ch. 17, sec. 1: Held, that the giving such bond is a waiver of objections to the truth of the facts stated in the affidavit and the sufficiency thereof. *Ibid.*

5. The affidavit required by the act of 1831, ch. 40, sec. 5, constitutes no part of the record in the cause, and, therefore, a *scire facias* need not recite that an affidavit was made before the issuance of the *ca. sa.* *Nicholson vs. Patterson.*

CASE.

When a proper remedy. See TRESPASS. *Neal vs. Henly*, 551. *Johnson vs. Perry*, 569.

CERTIORARI.

An allegation in a petition for writs of *certiorari* and *supersedeas* that the petitioner could not give the security required by law is a sufficient reason why the petitioner did not appeal to authorize the granting of the writs. *Hale vs. Landrum*, 32.

CHAMPERTY.

1. The possession of part of a tract of land by A., who claims to the boundaries described in a written assurance by virtue of which the same is held, (whether it purport to convey a legal or equitable title,) is a possession to the extent of the boundaries therein described. *Pickens vs. Delozier*, 400.
2. A sale and conveyance of such land, or any part thereof, by one not in possession, or who has not received the rents and profits thereof for one whole year preceding such sale, is by the act of 1821, ch. 66, sec. 1, utterly void. *Ibid.*
3. The possession of a party holding without written assurance of title, does not extend beyond his actual enclosures. *Ibid.*
4. If A. is in possession of a tract of land by virtue of a deed or other assurance of title, which deed extends beyond the lines of an adjoining tract, the possession of A. does not extend beyond the part so included. A deed of the adjoining tract would, therefore, be void only for so much as was actually within the enclosures of the possession, or within the

CHAMPERTY.—Continued.

boundaries of the adverse deed. Such adverse possession of part of the tract conveyed, would not vitiate the whole deed by act of 1821, ch. 66, sec. 1. *Ibid.*

5. Where A. leases land of B., and subsequently disclaims his title and holds for himself or for another: Held, that the possession becomes adverse from the time such disclaimer is made known to B. and seven years possession, after such disclaimer so known, bars the title of lessor. *Bullard vs. Copps*, 409.
6. It is champertous in A. to sell and convey land so adversely held, at any time after such disclaimer is known. *Ibid.*

CHANCERY.

1. Where three persons purchase three several tracts of land of the same individual but by separate contracts, upon which the lien of an execution had previously attached, and two of the tracts were subsequently sold to satisfy the execution, the persons whose lands are sold have not a right to compel him whose land was not sold to contribute to reimburse their loss. *Jobe vs. Obrien*, 34.
2. The principle of contribution grows out of joint undertakings and does not apply to cases like the present. *Ibid.*
3. See ATTACHMENT FOR CONTEMPT.
4. It is the peculiar province of a court of Equity to rectify mistakes. *Helm vs. Wright and Graham*, 72.
5. Where an obligor in a delivery bond by mistake acknowledged in the bond that the property therein set forth belonged to the defendant in the execution, when in fact it belonged to himself: Held, that the court had the power to reform such bond and to restrain the obligee in such bond from pleading it to the prejudice of the rights of the obligor. *Ibid.*
6. Where a bill was filed against H. & D. former partners, to enjoin the collection of a judgment, obtained on a bill single, (which on a division of the effects had fallen to D.) and D. had answered and denied the equity of the bill, and H. had permitted the bill to be taken *pro confesso* as to him: Held, that such default did not estop D. from denying and disproving the equity of the bill. *Petty vs. Hannum*, 102.
7. H. & D. purchased a bill single, given without consideration, without notice of such want of consideration, at a large discount: Held, that they were entitled to recover only so much as they had paid for the said bill single. *Ibid.*
8. Bell leased a furnace and forge to S. & C. to be returned in good repair. S. & C. dissolved partnership; C. taking the

CHANCERY.—Continued.

forge and S. the furnace for the residue of the term. C. delivered up the forge in good repair, and S. the furnace in a dilapidated condition. Bell sued S. on his covenant, and the counsel of Bell, under the belief that it was necessary to qualify Collier as a witness, advised a release of him by Bell, which was accordingly executed and delivered. Steel, thereupon, pleaded this release in discharge of himself: Held, on bill filed by Bell to restrain S. from setting up this release:

1st. That the discharge of one obligor by the obligee operates as a discharge of the other:

2nd. That ignorance of the law shall not affect agreements, nor excuse from the legal consequences of particular acts in a court of chancery.

3d. That the exceptions to this general rule are few, and will be found generally connected with circumstances of imposition, misrepresentation, undue influence, misplaced confidence, &c. *Bell vs. Steel*, 148.

9. Where a tract of land, intended to be sold, was laid off into lots with streets intersecting each other for the benefit of purchasers, and the lots were sold: Held, that the obstruction of such streets, by one or more of the purchasers, to the injury of other purchasers, was a nuisance relievable in chancery. *Leake vs. Cannon*, 169.
10. Where such land, so divided, was sold under a decree in chancery, upon a credit of one, two and three years, and the bill still pending, and the purchasers come into possession under the sale: Held, that the property was still *sub judice*, that the purchasers were *quasi* parties, and that the court had the power, on the petition of any purchaser, to have the nuisance abated in the name of the complainants. *Ibid.*
11. A parol promise to give real estate, possession taken by virtue of such promise, and valuable and permanent improvements made with the consent of the owner, furnish no ground for a decree enforcing the promise. *McNairy vs. Ridley*, 174.
12. Where, in a parol contract, by gift or sale, a decree for a specific performance is refused because within the act of 1801, ch. 25, an injunction will not be granted to quiet the possession of the donee or vendee. *Patton vs. McLure, M. & Y.* *Ibid.*
13. Where the owner of real estate puts a relative in possession thereof, for the purpose of cultivating and improving the same, under the promise of a future gift, and the occupier influenced by such expectation, makes lasting and valuable

CHANCERY.—Continued.

improvements upon the premises with the knowledge of the owner, such occupier will be entitled to the full value of the improvements, although it may exceed the amount of the rents and profits. *Ibid.*

14. In such case the owner cannot set up any independent claim to the rents and profits, yet if the occupier files his bill for the value of his improvements, the value of what he has enjoyed is a necessary element in the adjustment. *Ibid.*
15. It is a general rule in chancery, that where an allegation is made in a bill and directly denied by the answer, such allegation must be proved by two witnesses or by one witness and corroborating circumstances. *Van Wyck vs. Norvell*, 193.
16. The answer of a corporation is not by oath but by its corporate seal, and may therefore be overturned by one witness. *Ibid.*
17. Shelby, executor, transferred and appropriated to his own purposes, thirty shares of Bank stock, belonging to the legatees of Jameson, deceased: Held, in a bill filed against him for an account thereof by the legatees, that he was liable for the value of the stock at the time of the transfer, and interest thereupon from that time till the decree. *Jameson vs. Shelby*, 278.
18. Where the answer of the defendant sets forth and shows a state of facts which entitles the complainant to a decree, the complainant is entitled to such a decree, though the bill may not by its allegations make out such a case. *Ibid.*
19. Where, however, the bill prayed only a decree for an account of thirty shares of Bank stock, and the answer of the executor alleged, that he, as executor, was indebted, on settlement with commissioners appointed by the county court, to the legatees, \$756; that he had executed his note therefor and had subsequently paid said note: Held, that this state of the pleadings did not authorise a decree against the defendant for such sum, the answer not making on the face thereof a case proper for a decree. *Ibid.*
20. A court of chancery will give relief in all cases where a bond has not been satisfied and the obligee is prevented from suing at Common Law by reason of its being lost, or defaced, no matter by what cause, provided it be not by his own misconduct. *Harrison vs. Turbeville*, 242.
21. A court of chancery will enforce the lien of vendor for purchase money; and herein of evidences of a waiver thereof. *Campbell vs. Baldwin*, 248.
22. Brown conveyed real and personal property in trust for the

CHANCERY.—*Continued.*

- benefit of creditors. Brown and Smithers, by another deed, conveyed certain other real and personal property in trust for the benefit of certain other creditors. Johnson having a judgment against Brown, and also against Brown and Smithers, partners, filed his bill against Brown, and Brown & Smithers, the trustees and creditors, to subject the property in said deeds to the satisfaction of his judgments: Held, that said bill was demurrable for multifariousness, there being no connection whatever between the creditors secured in the two deeds. *Johnson vs. Brown*, 327.
23. No principle can be extracted from the numerous cases on the subject of multifariousness, which can be adhered to as a general rule. The court must determine each case upon its own peculiar circumstances; avoiding on the one side the evil of multiplicity of suits, and on the other the evils arising out of blending in one suit, distinct and incongruous claims and liabilities. *Ibid.*
24. Where a demurrer to a bill is sustained for multifariousness, the complainant may in the chancery court dismiss his bill as to a portion of the defendants, by the joining of whom with others the multifariousness is created, and prosecute as to the rest. Where, however, the complainant does not choose to dismiss his bill as to a portion of the defendants, on the sustaining the demurrer by the chancellor, but appeals, and the judgment is deemed correct, the supreme court will not remand, but dismiss, without prejudice to the institution of other suits. *Ibid.*
25. A benefit to a party promising, or a prejudice or trouble to the party to whom the promise is made, is a good consideration. *Macon & Bailey vs. Sheppard*, 335.
26. Where Washburn promised to convey land to a trustee, for the benefit of a society of Christians, upon condition that said trustee and society of Christians would erect thereupon a house for purposes of public worship: Held, that the erection of such a house on the land was a benefit to Washburn, and trouble and expense to the trustee and society, and therefore a good consideration intervened. *Ibid.*
27. Where Washburn agreed, by parol, with a certain trustee and society of Christians, to convey an acre of land to such trustee for the benefit of said society, upon condition that they would erect a house for public worship, and said society did erect the house as agreed upon, and Washburn sold and conveyed the acre of land with the tract to which it was attached to Beard, and Beard made a bond in conformity with the parol agreement: Held, that this bond was as obligatory as though it had been made by Washburn. *Ibid.*

CHANCERY.—*Continued.*

28. Where complainants acquire an equitable right to land, such right can be enforced against every successive vendee, who may acquire the legal right to such land with notice of complainants' equity. *Ibid.*
29. The possession of a church by the officers thereof, for purposes of public worship, is as much an actual possession as residence on the premises by any citizen. *Ibid.*
30. If a person purchase land of another, knowing at the time of the purchase that the land is in the possession of other persons, he is bound to enquire into their title, and is affected with notice of all facts in relation thereto. *Ibid.*
31. When there is a trust charged upon executors in the sale of real estate and in the disposition they are to make of the proceeds, it is the settled doctrine of a court of chancery that the trust does not become extinct by the death of one of the executors. *Robertson vs. Gaines*, 367.
32. A court of chancery will interfere upon the principle of *quia timet*, and use its process, for the prevention of great and irreparable mischief as by the establishment and organization of a county in opposition to provisions of the constitution. *Bradley vs. Commissioners, &c.* 428.
33. When the husband with the consent of his wife took possession of money which belonged to the wife before marriage, had been conveyed to a trustee for her benefit, which deed had never been registered, and such husband, with her consent converted the money into property and took titles thereto in his own name: Held, that the wife had no equitable claim upon such property against the creditors of the husband. *Baldwin vs. Baldwin*, 473.
34. A court of chancery will entertain jurisdiction for the purpose of decreeing the surrender of slaves; yet it is necessary to its exercise in every case, that the complainant's right should be clear and unquestionable. *Martin vs. Fancher*, 511.
35. Strayhorne holding notes on Brown, to which Hill was security, agreed to take new notes of Hill and Brown, payable at a later date to himself, and surrender the old notes. Hill made the notes in conformity with the agreement, and gave them to Brown for signature and delivery. They were tendered, and Strayhorne refused to take them, and thereupon Brown sold them to Crosby, at a large discount, with his own endorsement thereupon: Held,
1st. That Crosby had no equitable claim on the notes against Hill, they being payable to Strayhorne, and endorsed to Crosby by Brown.
2nd. That although a judgment had been rendered at law

CHANCERY.—Continued.

on the notes, and the defendant had failed to plead *non est factum*, chancery would relieve, the defence at law being by no means a clear and unembarrassed one. *Hill vs. Crosby, Ad.*, 545.

36. A court of chancery will not grant partition without making a party who has received more than his share of rents and profits account therefor. *Coleman vs. Pinkard*, 185.
37. No assignment by the husband of the reversionary choses in action or other equitable interests of the wife, even with her consent and joining in the assignment, will exclude her right of survivorship. *Caplinger vs. Sullivan*, 516.

CHARGE OF THE COURT.

1. The circuit judge in his charge to the jury, should confine himself to an explicit statement of the principles, which, in his judgment, have an immediate application to the case before him, and his not having charged the jury on every point which might have had some bearing on the points in controversy, will not be regarded as error, more especially if he is not requested to charge upon such points. *Bridges vs. Vick*, 514.
2. Error in the charge of the court in favor of a party cannot be taken advantage of by him. *Elkins vs. The State*, 543.
3. Although the judge may charge the jury erroneously, yet if there be no proof in the record to which such charge is applicable, it furnishes no ground of reversal, as it could not have misled the jury. *Webster vs. Fleming*, 518.

CONFLICT OF LAWS.

See *Dougherty vs. Curle*, 453; *Hughes vs. Cannon*, 589; *Baldwin vs. Baldwin*, 473; *State vs. Allen*, 258; *Keaton's distributees vs. Campbell*, 224.

CONSTITUTIONAL LAW.

1. Evans was elected in March, 1836, register of Claiborne county, and died in 1837. Hurst was appointed on the 4th of April, 1837, to fill the vacancy. On the 3rd of March, 1838, he was elected register by the qualified voters of the county, the first election of county officers being held on that day; Held, that Hurst was constitutionally elected and in office for four years from the date of said election. *Powers vs. Hurst*, 24.
2. The Legislature have the power to dispose of a portion of the vacant and unappropriated land belonging to the State for public purposes, such as the establishment of a county seat, for a less consideration than the lands are disposed of to citizens generally, and to make such disposition prior in

CONSTITUTIONAL LAW.—Continued.

point of time to the opening of an Entry-Taker's office for general entry. *McConnell vs. Commissioners of Madisonville*, 53.

3. The act of 1837-8, ch. 137, sec. 2, which, prohibits any person from wearing any bowie-kife, or Arkansas tooth-pick, or other knife or weapon in form, shape or size resembling a bowie-knife or Arkansas tooth-pick under his clothes or concealed about his person, does not conflict with the 26th section of the first article of the bill of rights, securing to the free white citizens the right to keep and bear arms for their common defence. *Aymette vs. The State*, 154.
4. The arms, the right to keep and bear which is secured by the constitution, are such as are usually employed in civilized warfare, and constitute the ordinary military equipment. The legislature have the power to prohibit the keeping or wearing weapons dangerous to the peace and safety of the citizens, and which are not used in civilized warfare. *Ibid.*
5. The right to keep and bear arms for the common defence, is a great political right. It respects the citizens on the one hand, and the rulers on the other; and although this right must be inviolably preserved, it does not follow that the legislature is prohibited from passing laws regulating the manner in which these arms may be employed. *Ibid.*
6. Section 9, of article 6, of the constitution, to wit, "Judges shall not charge jurors with respect to matters of fact, but may state the testimony and declare the law," construed. *Claxton vs. The State*, 181.
7. The Governor of the State of Tennessee, on the demand of the Governor of Alabama, surrendered the body of Allen, who had been previously arrested for murder in the State of Tennessee and bound over, and who was on bail at the time of the demand made: Held,
 1. That it was not the imperative duty of the Governor of the State of Tennessee to have surrendered him until he was legally discharged from the operation of the laws of Tennessee.
 2. That having, however, delivered him over to the constituted authorities of Alabama, such act discharged the bail from his recognizance. *State vs. Allen*, 258.
8. Whether a statute is the law of the land within the meaning of the 8th section of the bill of rights, always depends upon two propositions:
 1. That the legislature had the power to pass it.
 2. That it is a general and public law, equally binding up-

CONSTITUTIONAL LAW.—Continued.

- on every member of the community. *Sheppard vs. Johnson*, 285.
9. If the legislature had the power to deprive a freeman of his freehold by an act of legislation, yet the court would not adjudge that that body intended to exercise so high a prerogative, unless the law so declared in express and direct terms: such a result could not be arrived at by equitable construction of a statute. *Ibid.*
 10. A grantee who neglected to have his land processioned in accordance with the act of 1819, is not bound by an erroneous procession made by the surveyor, and estopped thereby from claiming to his true line. *Ibid.*
 11. The court charged the jury, that if they believed the statements of the witnesses, the chastisement inflicted by the parent upon the child was "cruel and barbarous in the extreme:" Held, that this was charging upon the facts, and violated the defendant's constitutional rights. *Johnson, et ux. vs. The State*, 283.
 12. The legislature established the county of Powell. This county did not, according to prescribed limits, contain three hundred and fifty square miles, as required by sec. 4, article 10, of the amended constitution of 1835: Held, that this was a void exercise of power, and must be so declared by the judicial department of the State, when properly brought up. *Bradley vs. Commissioners, &c.* 428.
 13. The writ of *quo warranto* is the common law mode of redressing such grievances; but a court of chancery, as established upon its present broad and substantial basis, will interfere upon the principle of *quia timet*, and use its process of injunction for the prevention of great and irreparable mischief. *Ibid.*
 14. Any person aggrieved by the proceedings, may apply for the remedy. *Ibid.*
 15. The court cannot constitutionally charge juries upon the sufficiency of testimony. *Farmers and M. Bank vs. Harris*, 311.
 16. The legislature have the power to pass laws for the purpose of curing the defective probate and registration of deeds, under previously existing laws; the solemnities which are required to evidence the transfer of property, affecting the remedy and not the rights of the parties. *Hughes vs. Cannon*, 589.

CONTRACT.

A sale of a slave by parol made in the State of Tennessee is void; and this is so, though the slave were in the State of

CONTRACT.—Continued.

Alabama at the time of the making of the contract. The law of the place where the contract is made governs, and not *lex loci rei sitæ*. *Dougherty vs. Curle*, 453.

CONTRIBUTION.

The principle of contribution grows out of the joint undertaking of parties. *Jobe vs. O'Brien*, 34.

CORPORATION.

1. The Corporate authorities of the town of Nashville, under a grant of power to "license, regulate and restrain theatrical amusements," may exercise the taxing power as a means to effect this object. *Hodges vs. Mayor, &c.* 61.
2. The 2d section of the act of 1806, ch. 33, conferring the power upon the Corporate authorities to license, regulate and restrain theatrical amusements, and authorising the use of the taxing power as a means to regulate and restrain them, is not a law to tax theatrical amusements, within the meaning of the act of 1819, ch. 51, sec. 2, and the grant aforesaid of 1806 is, therefore, not repealed by the 2d section of the act of 1819, ch. 51. *Ibid.*
3. The answer of a corporation is not on oath, but by its corporate seal. The answer of a corporation does no more than create an issue in pleading, and therefore the allegation in a bill against a corporation, which is denied in the answer, may be overturned by one witness. The fact, that such answer is sworn to by the cashier, cannot alter the rule, the cashier being no party to the proceeding. *Van Wyck vs. Norvell*, 193.
4. The charter of the Union Bank of the State of Tennessee is a public law and need not be given in evidence. Although the corporation may be correctly denominated a private corporation, yet the law creating it is a public law. *Williams, et als. vs. Union Bank*, 339.
5. Evidence of acts of *user* is *prima facie* proof of the performance of the conditions required to be performed precedent to the time the bank was to go into operation. *Ibid.*
6. A recognition of a bank in a public law as a legally existing corporation, is, so far as third persons are concerned, conclusive evidence of its legal existence, against which nothing can be heard in a collateral way from such third persons. *Ibid.*
7. The object of the creation of a banking corporation is the public good. The profit to stockholders is incidental only. *Ibid.* See sec. 7, article 11. of the constitution.
8. An act was passed for the construction of a turnpike road,

CORPORATION.—*Continued.*

entitled, "An act to incorporate the Franklin and Columbia Turnpike Company," and directing the commissioners appointed to designate the route of the road, to select the shortest and the best route between the towns of Franklin and Columbia: Held, that the intent of the legislature, as derived from the terms of the said act was, that the road should run from the limits of the corporation of one town to the limits of the corporation of the other. *Columbia & Franklin T. C. vs. Campbell*, 467.

9. The charter of the Franklin and Columbia Turnpike Company authorised the erection of a toll gate within two miles of Columbia, when the road should be completed seven miles from the limits of the corporation: Held, that such company had no right to establish the gate until the terms of the charter had been complied with, by the completion of the road to the limits of the corporation; and although established upon the warrant of the Governor, such company had no right to exact toll. *Ibid.*
10. The warrant of the Governor, reciting certain facts, and authorising the establishment of a gate, is *prima facie* evidence of the facts recited therein; and the establishment of a gate by warrant of the Governor, is not conclusive evidence of the right to demand and exact toll. *Ibid.*
11. Corporations are created for the public good: the profit they are permitted to make, is only intended to induce them to labor for the public good, and to remunerate them for that labor. See article 11, sec. 7, of the constitution. *Ibid.*
12. Where the charter directed, that the route should be the shortest and best route between the towns of Franklin and Columbia, and the route is designated by commissioners, the road completed, examined, and gates established upon the warrant of the Governor: Held, that these facts are conclusive that the route selected is the *nearest and best route*, so far as the right to exact toll is concerned. *Ibid.*
13. If, however, the deviation from the route is manifest and flagrant, and the freehold of an individual is injured thereby, the individual so injured, would have the right to restrain the company by injunction from such gross departure from the terms of the charter. *Ibid.*
14. The legislature may constitutionally take private property for public easements, and may incorporate companies with like power. *Hadley, et ux. vs. H. T. Co.*, 555.
15. The act incorporating the Harpeth Turnpike Company, declares, that the chief engineer of the State shall survey and mark the most direct and practicable route for the con-

CORPORATION.—Continued.

struction of the road, and makes it the duty of the company to construct the road on the route thus marked out. The chief engineer did not actually survey and mark out the route, but gave such a description of the route which he believed the road should go, as would "serve to guide the directory in its actual location:" Held, that this was not such a designation of the route and location of the road as would bind the directory, if in their judgment it was not the most direct and practicable route. *Ibid*

16. The act also directs, that the road shall be commenced "at a point near the place where the Franklin Turnpike road crosses Little Harpeth." The directory established the commencement of the road about one mile and a half from the point where the Franklin Turnpike crosses Little Harpeth: Held, that a reasonable conformity with the requisitions of the act is all that can be required, and that it could not be said that this point was not in reasonable conformity with the directions of the act. *Ibid*.

CORPORATION *quasi*. See *Polk vs. Plummer, et als.* 500.

COUNTERFEITING COIN.

See CRIMINAL LAW.

COUNTERPART WRIT.

See JURISDICTION.

COVENANT.

1. A covenant by the lessor to pay the lessee the cash valuation of such improvements as the lessee might leave standing upon the premises leased at the termination of his lease, is not a covenant running with the land, so as to change the assignees of the reversion under the provisions of the statute of 32d Henry 8th, ch. 34. The covenant is personal and binds the lessor only. The assignee of the reversion is not bound in such case unless by express words. *Bream & Co. vs. Dickerson and Shrewsberry*, 116. 126
2. The reservation of power by the lessor to pay the value of improvements in one, two and three years, or at his election, to pay the same out of the rents of said improvements, if they would rent for an amount sufficient to pay the said value, does not create an equitable charge upon the estate so as to authorise the lessees or their assignees to hold possession till the value aforesaid should be discharged. *Ibid*.
3. Where there is such an alternative covenant and the lessor assigned the reversion, the lessor and those representing him loses by such assignment the power of electing, to pay the value of improvements out of the rents, and the les-

COVENANT.—*Continued.*

sor is left liable on his covenant to pay in one, two and three years. *Ibid.*

4. Where A. was the owner of a furnace, and B. of a forge, and A. agreed to furnish B. with five hundred tons of pig metal as B. should need such metal for manufacture: Held, that B. was not entitled to demand and have delivered to him the whole amount of five hundred tons at once, and that the obligation to supply was limited to the wants of B.'s manufactory, and that B. was bound from time to time to notify A. of the wants of his establishment. *Rodgers vs. Love*, 417.

CRIMINAL LAW.**ASSAULT, FELONIOUS.**

1. In order to sustain a conviction of a slave under the act of 1835, ch. 9, for an assault and battery, with intent to commit murder in the first degree, it must be alleged in the indictment and proven on the trial that the person assaulted was a free white person. *Elijah vs. The State*, 455.
2. The name of the person assaulted furnishes no presumption that he was a free white person, neither does the fact that he was a witness in the case against the slave, nor that he was foreman in a mechanic's shop. *Ibid.*
3. To sustain a conviction for a felonious and premeditated assault "with an intent to kill and murder in the first degree" under the 53d section of the act of 1829, ch. 23, it must appear that the assault was of such a character, and made under such circumstances, that, had the death of the person so assaulted, ensued, the assailant would have been guilty of murder in the first degree. *Dains vs. State*, 439.
4. To sustain a conviction for murder in the first degree, under the 3rd section of the act of 1829, ch. 23, proof must be adduced to satisfy the mind that the death of the party slain, was the ultimate result sought by the deliberate and premeditated will of the assailant. *Dale vs. State*, 10th Yerger, 551. *Ibid.*
5. The employment of a deadly weapon, such as an axe, whereby death is produced, although it implies malice at common law, does not imply that the act was done with such premeditation as to make it murder in the first degree under the statute. *Ibid.*
6. In criminal cases the supreme court will reverse and award new trials whenever in its judgment the verdict is not warranted by the proof. The rule, that the court will not disturb the verdict of a jury, unless a case of manifest rashness appear, is confined to civil cases. *Ibid.*

CRIMINAL LAW.—Continued.

7. To sustain a conviction of a slave under the act of 1833, ch. 19, sec. 10, it must be alleged in the indictment, by distinct averment, and proved that the assault committed by the slave, with the intent to ravish, was on the body of a free white woman, an assault on a black woman, with intent to ravish, not being punished with death, as in such a case of assault on the body of a free white woman. *Grandison vs. The State*, 451.
 8. A caption which does not state where the court was holden, at which the conviction was had, or that a grand jury of good and lawful men was empanelled, is defective, and the judgment must be arrested, for either of these causes. *Ibid.*
- COUNTERFEITING CURRENT COIN.**
9. An indictment charging the defendant with having passed counterfeit "dollars," describes with sufficient certainty the character of coin counterfeited. It is not necessary that it should show that it was a Spanish or Mexican dollar or a dollar of the United States. The species of coin must be described; nothing more. *Peek vs. The State*, 78.
 10. The 39th section of the act of 1829, ch. 23, declares it to be felony in any one, to make fraudulently any coin in imitation of the current coin of the State: Held, that an indictment under this section charging the defendant with fraudulently making coin to the likeness and similitude of the current coin was good. Where the words used in the indictment are equivalent to, or of more extensive signification than those used in the statute, such words are sufficient. *Ibid.*
 11. Where an offence at common law was a misdemeanor, and has been raised by the act of 1829, ch. 23, to the grade of felony, the indictment need not charge that the act was done feloniously; the 72d section of said act, having declared indictments framed according to common law form, good and valid to sustain a conviction under said statute. *Ibid.*
 12. Evidence that the defendant had passed other counterfeit coins at other times, either before or after the offence for which he was indicted is admissible, to show that he knew the money passed by him in the particular case was counterfeit money. Such evidence is, however, a departure from the general rule, that proof of an offence not charged in the indictment shall not be heard; and, therefore, if the counterfeit coins alleged to have been passed at another time were not produced on trial so their baseness could be fully established, the proof that they were counterfeit should be positive and direct, so far as the knowledge and belief of a witness would go. *Ibid.*

CRIMINAL LAW.—*Continued.*

13. If incompetent evidence has been received, the court will award a new trial to the defendant in a criminal case, though it may appear to the court that the verdict of the jury is correct. The contrary rule has never prevailed in this State. *Ibid.*

FALSE PRETENCES.

14. An indictment for obtaining goods by false pretences, must contain an absolute negative of the truth of the pretences employed. *Tyler vs. The State*, 37.
15. An order in the following words, "Messrs. G. and L. please let the bearer, E. Tyler, have five dollars in goods on my account. R. H. L." is negatived with sufficient certainty by an averment in the following words: "Whereas the said R. H. L. never did write, or send, or cause to be written or sent any such letter to the said Gains & Luttrell, or to any one else to let the bearer have any amount in the store whatever." *Ibid.*
16. In an indictment for obtaining goods by means of a forged order, it is not necessary that the person who purports to be the drawer of the forged order should have an interest in the goods obtained. *Ibid.*

FORGERY.

17. In an indictment for forging a receipt, it is not necessary that it should be averred, that the person charged with the offence, is indebted to the individual against whom the receipt is forged, in order to show that the latter stands in a situation to be defrauded by the former. *Snell vs. The State*, 347.

MANSLAUGHTER.

18. "Judges shall not charge juries with respect to matters of fact," and if it be done against a defendant in a State case, it is a breach of his constitutional right, erroneous, and furnishes a just ground to reverse the judgment rendered against such defendant. *Claxton vs. The State*, 181.
19. The juries are the exclusive judges of the credit due to witnesses, of the weight of testimony, and the truth of all contested statements before them. *Ibid.*
20. What constitutes excusable homicide or manslaughter, the facts being ascertained, is a conclusion of law, and not of fact. *Ibid.*
21. Where the court charged the jury, that if they should find a special verdict, which presented the testimony of Jones as the facts of the case, he should declare it a case of manslaughter: Held, that this charge announced a conclusion of law upon a hypothetical state of facts, and did not trench upon the constitutional rights of the defendant. *Ibid.*

CRIMINAL LAW.—Continued.

22. Where the court, in a case which involved the question as to whether the correction of a child by a parent amounted to a trespass, charged the jury, that if they believed the witnesses, "the conduct of the defendant was barbarous and cruel in the extreme:" Held, that such charge announced to the jury a conclusion of fact, and that the judge invaded the province of the jury. *Ibid.*

PASSING COUNTERFEIT BANK NOTES.

23. To sustain a conviction under the act of 1829, ch. 23, sec. 33, it is sufficient if the indictment charge the defendant with having kept the counterfeit bank note with a "fraudulent" intent to pass it. It is not necessary that the indictment should charge that it was kept with a felonious intent. *Perdue vs. The State*, 494.
24. Where the bill of exceptions did not show, that the witnesses whose statements were set out were sworn, in the absence of proof to the contrary, it will be presumed, in favor of a correct administration of justice, that they were sworn. *Ibid.*
25. Where the proof showed, that the defendant passed a bank note; that the note was fictitious; that he gave different accounts as to the person from whom he received it, and did not attempt upon trial to explain: Held, that such proof sustained a verdict of guilty. *Ibid.*
26. Where the circuit judge charged the jury, that if the note was fictitious, and the prisoner knew it, and passed it in absolute payment of a debt, this would amount to a passing under the 31st sec., although at the time of passing it he might have agreed to take it back if it proved not genuine: Held, that this charge was correct, the offence consisting in the passing it with the knowledge that it was spurious. *Ibid.*
27. The question as to defendant's knowledge of the spuriousness of the bank note, is a question for the jury. *Ibid.*

PERJURY.

See **SLANDER**, 2.

MISDEMEANORS.

ASSAULT, NOT FELONIOUS.

1. The indictment charges that the defendant did make an assault by then and there drawing a pistol and threatening to shoot him, (the said Herring,) within the distance the said pistol would carry: Held, that this charge was good, it not being necessary that the indictment should charge that the pistol was pointed at the party assaulted. *State vs. Smith*, 457.
2. If a person present a pistol at another, purporting to be

CRIMINAL LAW.—*Continued.*

loaded, so near as to have been dangerous to life, if the pistol being loaded, had gone off, this is an assault in law, though the pistol were not in fact loaded. *Ibid.*

CARRYING BOWIE-KNIFE.

Wearing bowie-knife concealed, indictable. See CONSTITUTIONAL LAW, 3, 4, 5.

GAMING.

1. Betting on elections is indictable. Act of 1823, ch. 25, sec. 2, N. & C. 491. *State vs. Cross*, 301.
2. Where an order is made by a circuit judge, directing a prosecution by the attorney for the State, *ex officio*, without limiting the time within which it must be executed, it operates as a mandate to the officer so long as the cause for making it exists, and the thing directed remains unaccomplished. *Ibid.*
3. In an indictment for betting on an election, an allegation charging the pendency of the general election for a particular year, and that the bet was made upon the event of that election is sufficient. It is not necessary to charge that the defendant bet upon the success of any particular candidate. *Ibid.*
4. To constitute gaming, there must be a wager, and the event upon which the wager depended, must be decided. *Dobkins vs. State*, 424.
5. A charge in a presentment or indictment, that the defendant "bet upon a horse race," does not charge an offence, as such words do not *ex vi termini* import that the race was run. *Ibid.*
6. In cases of conviction, in courts of record, for gross misdemeanors, it is a discretionary judgment at common law, to require sureties for good behaviour. *Estes vs. State*, 496.
7. A single act of gaming, unaccompanied with circumstances of aggravation, is not such a misdemeanor as will authorise a court to require sureties for good behaviour. *Ibid.*
8. Where a judge required a bond, that the defendant would not gamble in twelve months: Held, that no such special bond is authorised by law. The court (if the case had been such as authorised the exercise of the power) should have required a general bond for good behavior. *Ibid.*

LEWDNESS.

In an indictment against persons for living and co-habiting together in lewdness, it is not necessary that it should be charged that such living and co-habiting together in lewdness was notorious. The notoriety of such conduct consti-

CRIMINAL LAW.—Continued.

tutes no part of the offence. *State vs. Cagle and Boling*, 414.

MALICIOUS MISCHIEF.

1. An indictment under the Act of 1803, ch. 9, sec. 2, must charge that the disfigurement of the beast was done maliciously. *Boyd vs. State*, 37.
2. Cutting off the hair of the tail of a horse or his mane, if done maliciously and of purpose, is within the statute and indictable as malicious mischief. *Ibid.*
3. Where a confession is obtained by a promise to put an end to a prosecution, such confession is inadmissible as evidence. *Ibid.*
5. Where the proof is direct and manifest that a confession is obtained by the hope of advantage to be obtained by the making of such confession, and the court left it to the jury to say whether under all the circumstances the confession was improperly obtained, telling the jury that if they believed that the confession was induced by a promise they ought to disregard it: Held, that such charge was erroneous; it was the province and duty of the court to have excluded such testimony. *Ibid.*

NUISANCE.

1. No length of time renders a nuisance lawful, or estops the State from abating it, and punishing the person who creates such nuisance. *Elkins vs. The State*, 543.
2. A much shorter period will suffice to establish a right in the State to the use of the land of an individual for highway purposes, than to show that a private person has a right to the estate of which he is possessed. *Ibid.*
3. Where the travelling public had for ten years actually ceased to use a portion of a road established by public authority, and had by *user* acquired a right to a portion of the land of the trustees of a church for highway purposes, instead of said portion of old road: Held, that the acquisition of a right of way over the land of the trustees did not estop the State from asserting its claim to the old road, nor shield the individual obstructing it from punishment. *Ibid.*

RETAILING SPIRITOUS LIQUORS.

1. The act of 1838, ch. 120, makes the sale of a quart or greater quantity of spiritous liquors to be drank at the place where sold, a misdemeanor and indictable. *Sanderlin vs. The State*, 315.

CRIMINAL LAW.—Continued.

2. The word "plantation" used in the statute of 1779, is of very extensive signification, and when applied to a town, must be taken to mean the lot of ground, adjoining room, or other house attached to or belonging to the premises where the liquors are sold. *Ibid.*
3. The fact, that the person vending the liquor, furnished bottles, glasses, sugar, water, &c. to the purchasers, affords testimony proper to be left to a jury, to show that the vender intended the liquor, sold, to be drank on the "plantation." *Ibid.*
4. It is not necessary in an indictment for selling spiritous liquors by quantities greater than a quart, that such indictment should aver, that the liquors so sold were drank on the premises. It is the intention of the sale that constitutes the offence, and the fact that the liquors were drank on the premises, would be appropriate proof of the intention. *Ibid.*
5. Where the State and county were written at full length on the margin, and the indictment proceeded to state, that the grand jury empannelled to enquire for the body of "the county aforesaid" present, that D. Sanderlin, late of said county, unlawfully in said county, did, &c. &c.: Held, that, in an indictment for a misdemeanor, the venue was sufficiently averred. *Ibid.*
6. The same strictness is not required in the allegations in an indictment for misdemeanor as in those for felony. *Ibid.*
7. Wine is not a spiritous liquor, and the sale of it in less quantities than a quart is not indictable under the provisions of the act of 1838, ch. 120. *Caswell and Hill vs. State*, 402.
8. Two persons may be jointly guilty and jointly convicted of the offence of retailing spiritous liquors. *State vs. Caswell and Hill*, 399.

TRESPASS.

If a parent inflict unreasonable and cruel punishment on his child, it is an indictable offence. *Johnson, et ux. vs. The State*, 283.

DAMAGES.

1. In detinue the jury are not bound by the value laid in the writ and declaration, but may return a verdict for a larger amount; *secus*, in regard to damages for the detention of the slave. See **DETINUE**, *Goodman vs. Floyd*, 59.
2. In suit for freedom, nominal. *Woodfolk vs. Sweeper*, 88.
3. For false imprisonment of a free man as a slave, recoverable in separate action. *Ibid.*

DAMAGES.—Continued.

4. In the action of trespass the jury are not restrained in their assessment of damages to the amount of mere pecuniary loss sustained by the plaintiff, but may award damages in respect of the malicious conduct of the defendant and the degree of insult with which the trespass has been attended. 140.
5. Damages for an injury to a slave. *Johnson, et als. vs. Perry*, 569.

DEBT.

An action of debt by an endorser will lie against the maker and endorser of a promissory note jointly. *Planters' Bank vs. Tappan, et als.* 95.

DEED.

Delivery essential. See *Taylor vs. Taylor*, 597; *Goodrum vs. Carroll*, 490.

DEED OF TRUST.

See **FRAUD**.

DELIVERY.

1. Delivery of an office bond. See *Goodrum vs. Carroll*, 490.
2. Of bill of sale. See *Taylor vs. Taylor*, 597.
3. Of promissory note. See *Hill vs. Crosby*, 546.

DELIVERY BOND.

See **SHERIFF**, 1.

DEMAND.

Of specific articles. See *Rodgers vs. Love*, 417.

DETINUE.

1. In fixing the value of a slave sued for in detinue, the jury are not bound by the value laid in the writ and declaration, but may return a verdict for a larger amount; *secus*, in regard to damages for the detention of such slave.
2. Where, in an action of detinue, the jury gave the plaintiff judgment for the value of a slave and *damages for the detention of him to a larger amount* than was demanded in the plaintiff's declaration: Held, that the court having reversed the judgment for such error should proceed to render such judgment as should have been rendered below, to wit, for the amount of damages claimed in the declaration; provided the plaintiff would release the surplus. *Goodman vs. Floyd*, 59.
3. Where slaves had been committed to the custody of a jailor as a runaway, and had made their escape before the lapse of twelve months: Held, that the sheriff acquired no such

DETINUE;—*Continued.*

lien upon them for his fees as will sustain an action of detinue for the recovery of them. *Fowler vs. Norman*, 384.

DEVISE.

See **WILL; EXECUTORS; CHANCERY.**

DISCONTINUANCE.

When submission to arbitration operates as a discontinuance. *Bridges vs. Vick*, 517.

DISTRIBUTION.

See **ADMINISTRATION.** *Coleman vs. Pinkard*, 185; *Haywood's heirs vs. Moore*, 584.

DURESS.

Where a person has paid money under the pressure of legal process, such payment is not voluntary, the parties not being at the time upon equal footing. *Cocke vs. Porter*, 15.

EJECTMENT.

1. Grant void, because issued before Indian title extinguished. *Gillespie vs. Cunningham*, 19.
2. The possession which gives effect to statute of limitations. *Smith vs. McCalls' heirs*, 163.
3. When processioning operates. *Overton's heirs vs. Cannon*, 264. *Sheppard vs. Johnson*, 285.
4. The power of executors to sell real estate by direction of Will, &c. Trust, &c. *Robertson vs. Gaines*, 367.
5. Adverse possession by tenant. **CHAMPERTY.** *Bullard vs. Copps*, 409.
6. Probate of deeds. *Crockett vs. Campbell*, 411.
7. Of the sufficiency of a levy to pass title. *Brown vs. Dickson*, 395.
8. Champerty. Possession. *Pickens vs. Delozier*, 400.
9. Landlord and tenant. Tenancy in common. Estoppel. *Washington vs. Conrad*, 562.

ELECTIONS.

1. See **CONSTITUTIONAL LAW**, 1. *Powers vs. Hurst*, 24.
2. Betting on elections. See **GAMING**, 123, 1. See **CRIMINAL LAW, MISDEMEANORS.**

ENDORSER.

1. An action of debt by an endorsee, will lie against the makers and endorsers of a promissory note, jointly. *Planters' Bank vs. Tappan*, 95.

ENDORSERS.—Continued.

2. When dead, notice must be given to his personal representative. *Planters' Bank vs. White*, 112.
3. The want of averment of demand and notice not cured by verdict. *Knott vs. Hicks*, 162.
4. See **NEGOTIABLE PAPER**.

ENTRY.

1. Dougherty, by virtue of warrant No. 284, made an entry in the office of Carroll county, in 1822, and sold the land as entered to defendants. In 1825, by virtue of the same warrant, he made a second entry, in the same office, on a different tract of land, leaving the first entry standing on the books of the office not vacated or withdrawn in fact, and obtained a grant on the second entry: Held, that the first entry not being in fact vacated, the land was not vacant and unappropriated land, subject to entry. *Copeland vs. Woods*, 330.
2. See **OCCUPANT CLAIMS**.

ESCAPE.

See **SHERIFF**, 2, 3.

ESTATE.

See **REMAINDER. CHANCERY**.

ESTOPPEL.

1. The obligor in a bond is estopped by a recitation in the bond that the property sued for by him is the property of a third person. *Helm vs. Wright & Graham*, 72.
2. One partner is not estopped from denying notice charged upon him in a bill, by a *pro confesso* decree against his co-partner. *Petty vs. Hannum*, 102.
3. A grantee is not estopped by an erroneous procession under the act of 1819. *Sheppard vs. Johnson*, 285.
4. See **PROCESSIONING**. See *Overton's heirs vs. Cannon*, 204.
5. Where executors having power to sell and convey real estate do sell and convey by deed with covenant of warranty, such covenant of warranty estops the devisees of the testator from setting up and asserting an outstanding title against the vendee of the executors. *Robertson vs. Gaines*, 367.

EVIDENCE.

1. Where a confession is obtained by a promise to put an end to a prosecution such confession is inadmissible as evidence. *Boyd vs. The State*, 37.
2. When the proof is manifest and direct that a confession is obtained by the hope of advantage, it is the duty of the

EVIDENCE.—Continued.

court to exclude such confession. It is erroneous to leave it to the jury to say whether the confession was or was not improperly obtained. *Ibid.*

3. Where incompetent evidence has been admitted to the jury in a criminal case, the court will award the defendant a new trial, though the evidence in the record satisfy the court that the verdict is correct. *Peek vs. The State*, 78.
4. Evidence that the defendant passed other counterfeit coins, at other times, either before or after the offence for which he was indicted, is admissible to show that he knew the money passed by him in the particular case was counterfeit money. Such evidence is, however, a departure from the general rule that proof of an offence not charged in the indictment shall not be heard, and therefore if the counterfeit coins alleged to have been passed at another time were not produced on the trial, so that their baseness could be fully established, the proof that they were counterfeit should be positive and direct so far as the knowledge and belief of a witness could go. *Peek vs. The State*, 78.
5. A parol rescission of a written contract may be set up in equity in bar of an application for a specific performance; such parol rescission must, however, be clearly and satisfactorily made out in proof and the terms of it fully complied with and executed. *Walker vs. Wheatley*, 119.
6. The best evidence of a contract must be produced to the jury and therefore where a bill of sale was taken of personal property, in reference to which, the law did not require writing: Held, that having been reduced to writing it should have been produced. *Tatum vs. Jameson & Johnson*, 340.
7. Evidence of acts of *user* by the Union Bank is *prima facie* proof of the performance of the conditions upon which its legal existence depends. *Williams, et als. vs. Union Bank*.
8. A re-cognition of a bank in a public law as a legally existing corporation, is, so far as third persons are concerned, conclusive evidence of its legal existence against which nothing can be heard in a collateral way from such third persons. *Ibid.*
9. Whether a sheriff's bond has been acknowledged and recorded, must be answered by the records of the county court. No parol proof can be heard on the subject. *Bryan, et als. vs. Glass' Securities*, 390.
10. Deeds made after the commencement of a suit, confirming and ratifying deeds made before the commencement of the suit, are admissible evidence. *Crockett vs. Campbell*, 411.

EVIDENCE.—Continued.

11. See PROBATE.
12. It is the duty of a judge to reject incompetent evidence in all cases, unless the incompetency thereof is expressly waived; where, however, it is admitted without objection, its incompetency is waived, and the court will not grant a new trial on account of the admission of it. *Sharp vs. Wilhite*, 434.
13. Where a power of attorney under which a deed was executed was defectively proven, a deed of confirmation cured such defective probate, and the power of attorney is admissible evidence, (notwithstanding such defective probate,) for the purpose of showing what acts the attorney was authorised to perform. *Crockett vs. Campbell*, 411.
14. The circuit judge charged the jury that if the defendant threatened to whip the plaintiff out of the county, and plaintiff was afterwards whipped, it would in the absence of exculpatory evidence be a strong presumption against him; but if he had only expressed the opinion that he ought to be whipped out of the county, it would not be so strong a circumstance: Held, that there was no error in this charge. *Moffit vs. Grigsby*, 487.
15. Proof of medical bills contracted and paid after the issuance of the writ, is not competent evidence, nor proof of any collateral damages arising after suit instituted; proof may however be received that the slave died after the suit was instituted, or that the injury proved to be greater by lapse of time, such results being the immediate consequences of the trespass. *Johnson vs. Perry*, 569.
16. Parol evidence of collateral facts tending to enforce or explain a deed is admissible. *Haywood's heirs vs. Moore*, 584.

EXECUTION.

An execution must pursue the terms of the judgment. 445.

EXECUTORS.

1. The general principle of the common law is, that a mere naked power to sell, not coupled with an interest, given to several persons, must be executed by all, and does not survive. But when it is coupled with an interest, it may be executed by the survivor. *Robertson vs. Gaines*, 367.
2. A direction in a will to executors to raise money out of real estate for the benefit of creditors, without specifying how it was to be raised, conferred the power to sell such real estate for such purpose. *Ibid.*
3. Where a testator directs his executors to sell lands, without words vesting in them an interest in the lands, or creating

EXECUTORS.—Continued.

- a trust, such direction confers a naked power, which does not survive. *Ibid.*
4. Where, however, a testator directs his executors to sell lands for the benefit of creditors, or to do any act in which third persons are concerned, and who have the right to call on the executors to execute the power, such power survives. *Ibid.*
 5. A trust will survive, though no way beneficial to the trustee. *Ibid.*
 6. Where there is a trust charged upon executors in the disposition they are to make of the proceeds of the sale of real estate, it is the settled doctrine of a court of chancery, that the trust does not become extinct by the death of one of the executors. *Ibid.*
 7. Where A. and B. were appointed executors, with authority to sell and convey land, and A. qualified as executor and acted as such, and sold and conveyed land: Held, that B. not having qualified or acted as executor, A.'s deed passed the title, though no renunciation or refusal by B. was entered of record. *Ibid.*
 8. Where executors have power to sell and convey real estate, and do sell and convey by deed with covenant of warranty, such covenant of warranty estops the devisees of the testator from setting up and asserting an outstanding title against the vendee of the executors. *Ibid.*
 9. See ADMINISTRATORS.
 10. An executor requested a creditor should give the estate indulgence, till the debt the estate owed for land, should be paid: Held,
 - 1st. No particular form of demand is required by the proviso of the 4th section of the act of 1789, ch. 23, and such demand may be inferred from the fact, that a special request for indulgence has been made.
 - 2nd. That the request for indulgence till the land should be paid for, is sufficiently definite, and that the statute would commence running from the time the land was paid for, and not before that time.
 - 3rd. If an executor pay a debt clearly barred by the statute of limitations, is he guilty of a *devastavit*?
 - 4th. Where an executor is sought to be charged with a *devastavit* for the payment of a debt which was clearly just, and the collection of which was delayed till the time specified in the statute of 1789, ch. 23, had elapsed, such strict proof will not be required of the executor, that the debt was delayed by his request, as would be required of a creditor seeking to charge the estate.

EXECUTORS.—Continued.

5th. Ledbetter, having made his will, devising his estate to his daughter Melissa, died. Melissa not having received the estate from the executors of her father's will, died, leaving children: Held, that such children could claim only as the distributees of their mother, and could not demand a distribution from any person save the administrator of the deceased mother. *Thurman vs. Shelton*, 10 Yerg. Rep. 385. *Pucket vs. James*, 565.

FALSE IMPRISONMENT.

See FREEDOM. *Woodfolk vs. Sweeper*, 88.

FALSE PRETENCES.

See CRIMINAL LAW. FELONIES.

FORGERY.

See CRIMINAL LAW.

FRAUD.

1. Where the complainant was defrauded in the sale of his land by the misrepresentations of defendant as to quality and quantity of land, and more than seven years elapsed before he discovered the fraud: Held, that the statute barred complainant's bill for rescission, there having been no fraudulent concealment of any facts which he might not at any time have ascertained. *Peck vs. Bullard*, 41.
2. Where goods were delivered under a contract of sale with a condition made at the time of sale, that a note for the purchase-money should be given with an endorser: Held, that no title to the goods passed till the note with an endorser was given according to the contract, and that the goods were subject to be attached in equity by the owners, in the hands of a trustee to whom they had been subsequently conveyed. *Saunders & Martin vs. Turbeville, et als.* 272.
3. Where goods are obtained by fraud, the contract of sale is void, and the property in them remains in the original vendor. *Ibid.*
4. Where the owner of goods delivers them under a contract of sale, and subsequently proposes to take a deed of trust on them from the individual to whom he has delivered them, takes notes for the payment of the purchase-money payable at different times from the times of the original contract, and takes a power of attorney to confess judgment, and also takes an assignment of other effects to secure the payment of such notes: Held, that such proposition and acts are in affirmance of the title of the vendee, and that

FRAUD.—Continued.

the original owner shall not be heard to urge that the title to the goods do not pass. *Ibid.*

5. Where a deed of trust was made to save harmless certain securities against contingent liabilities, the vesting the owner of the goods with power by the deed to keep possession of them, and to continue selling them by retail, and to account for the proceeds, does not render the deed fraudulent, as against the creditors of such individual. *Ibid.*
5. Where such individual, to whom the goods were so entrusted as aforesaid, by the provisions of the deed, appropriated them contrary to the provisions of the deed: Held, that this constituted no evidence of fraud on the part of the beneficiaries in the deed, there being no proof that they had any knowledge of such fraudulent misappropriation of the effects. *Ibid.*

FRAUDS AND PERJURIES.

Wm. Tally, jr. having no credit at the store of Booker & Clarkson got goods of them directing them to charge the goods to his father, Wm. Tally. Booker & Clarkson did so charge them at the time. On being informed of the fact, W. Tally, sen'r, said they had done right in charging the goods to him and that he would pay for them: Held, that the credit having been given in the first instance to the father, and he having subsequently recognized the authority of the son to get the goods made the debt his own, and that he was properly chargeable therewith. *Booker & Clarkson vs. Tally*, 308.

FREEDOM.

1. When an action is brought to recover freedom, none but nominal damages can be recovered in such suit. *Woodfolk vs. Sweeper*, 88.
2. A second action is necessary to recover damages for the wrongful imprisonment of a freeman as a slave, and for the necessary expenses incurred in the recovery of his freedom. *Ibid.*
3. Where the circuit judge charged the jury that P. S. was entitled to recover as damages, the value of his services during the time he was wrongfully imprisoned, necessary witness and attorney's fees, &c.: Held, that this was erroneous, in leaving the jury no discretion as to the amount of damages; these were legitimate matters to be considered of by the jury in forming their verdict, but the plaintiff was not as a matter of legal right entitled to them. *Ibid.*

GAMING.

1. A note given to secure the payment of money, won on an election is void; and this is so, whether the persons wagering were electors or not, and whether the wager was made before the election or after. *Russell vs. Pyland*, 131.
2. Betting on elections indictable, act of 1823, ch. 25, sec. 2. *State vs. Cross*, 301.

GARNISHEE.

1. A garnishee is entitled to defend himself by the statute of limitations, and all other legal defences which he has against the suit of his creditor. *Hinkle vs. Currin*, 137.
2. Where a judgment was rendered in the county court against a garnishee, from which there was an appeal to the circuit court, the garnishee may insist upon the statute of limitations or any other legal defence arising upon the facts disclosed, although he did not insist upon such defence upon his examination in the county court or offer to make it by plea. *Ibid.*
3. Where a garnishee acknowledged in his answer that he had transferred his stock in a banking company, to the company, for the purpose of evading responsibility to the creditors of the institution: Held, that this was not such an acknowledgement of a subsisting debt as would take the case out of the statute. *Ibid.*
4. The act of 1809, ch. 63, sec. 1, authorising an appeal in "any civil case" embraces cases of garnishment, and the party aggrieved in such proceeding hath a right to appeal from the judgment of the justice as in other civil cases. *Clark vs. Williams*, 303.

GRANTS.

1. Grants of land made by the State of Tennessee to which the title of the Cherokee nation had not been extinguished at the time of the grant, are void and convey no title to the grantee. *Gillespie vs. Cunningham*, 19.
2. Where it was provided by compact between the United States and the Cherokee tribe of Indians, that all land lying within certain calls for certain natural objects should be ceded to the United States, and that commissioners appointed by the United States and by the tribe should run the line, and such commissioners did run the line, and it was subsequently acquiesced in by the parties: Held, that in a conflict of titles arising upon the question of the true location of said boundary, between citizens of the State, the line so run and acquiesced in shall be regarded as the true line. *Ibid.*

GRANTS.—Continued.

3. Grant, when of land by the State gives the grantee constructive possession. *Smith vs. McCall's heirs*, 163.
4. A grantee not estopped by an erroneous procession under the act of 1819. 285.
5. See ENTRY.

HIGHWAY.

Obstruction thereof. See **CRIMINAL LAW, MISDEMEANORS, NUISANCE.**

HUSBAND AND WIFE.

As to power of wife to be witness for her husband.

1. See WITNESS. *Moffit vs. The State*, 99.
2. As to the power to make deeds to each other. *Perry and Patterson vs. Gill, adm.* 218.
3. See *Baldwin vs. Baldwin, et als*, 473; *Haywood's heirs vs. Moore*, 584; *Cannon vs. Hughes*, 589; *Caplinger vs. Sullivan*, 548.

IMPROVEMENTS.

Compensation therefor. See **CHANCERY**, 8, 9.

INDEMNIFICATION BOND.

See **SHERIFF**, 1.

INDIAN TITLE.

See **GRANT**.

INDICTMENT.

1. See **CRIMINAL LAW**.
2. Indictment for obtaining goods by false pretences, when good. 37.
3. Indictment for malicious mischief, when good. 39.
4. Indictment for passing counterfeit coin, when good. 78.
5. Indictment for betting on an election, when good. 301.
6. Indictment for retailing spiritous liquors, when good. 315.
7. Indictment for forgery, when good. 347.
8. Indictment for lewdness, when good. 416.
9. Indictment for betting on horse race, when good. 424.
10. Indictment for an assault, when good. 457.

INFANT.

1. If an infant sell or exchange his personal property, he may at any time disaffirm the sale or exchange and sue for and recover the value of his property so sold or exchanged, and

INFANT.—Continued.

this is so, though the minor by such sale or exchange procured necessities. *Grace vs. Hale*, 27.

2. Where the son, a minor, lived upon the land of his father and was permitted by the father to cultivate twenty acres of his land for his own benefit: Held, that a horse was not a necessary within the meaning of the law for the purchase of which he would be bound. *Ibid.*
3. Where an infant exchanged horses and did not return the horse procured in the exchange: Held, in an action for the recovery of the value of the horse by him exchanged, the jury had no right to make an equitable adjustment between the minor and the defendant, but that the minor was entitled to the full value of his property. *Ibid.*
4. See APPRENTICE.
5. See PARENT and CHILD. *Johnson, et ux. vs. State*, 233.

INJUNCTION.

1. Violation of injunction. See ATTACHEMENT.
2. See CHANCERY.

INSOLVENT DEBTOR.

See CA. S.A.

JAILOR.

Fees for detaining runaway slave. See SHERIFF, 7. *Fowler vs. Norman*, 384.

JOINT ACTION.

See DEBT, PARTNER, JURISDICTION.

JURISDICTION.

1. A. issued a writ to Grainger county against B. where B. resided, a counterpart to Jefferson county against C. where C. resided, for a joint assault upon him; C. pleaded that the offence was committed in Grainger; that B. was not guilty, and that the writ was issued against B. in the county of Grainger to defeat the jurisdiction of Jefferson: Held,
 1. That the action for assault and battery is a transitory action and not local in its nature.
 2. That the enacting words of the act of 1820, ch. 25, sec. 3, is an affirmative statute, giving general power to institute joint actions where the defendants reside in different counties, and that the jurisdiction is based upon the residence of the parties.
 3. That the limitation, in the enacting words contained in the proviso, authorising the jurisdiction to be defeated on two grounds, first, where a writ issued to a county where

JURISDICTION.—Continued.

neither of the parties do in fact reside, second, where the suit is local in its nature, must be construed to disallow other matters of defence in abatement than those specially enumerated.

4. That a matter in abatement as to one of the defendants, is matter in abatement for all, by the proper construction of this proviso.

5. The jurisdiction of the court cannot depend on the successful prosecution of the suit against a portion of the defendants. *Rich vs. Rayle*, 404.

JURISDICTION OF CHANCERY COURT.

1. To decree contribution in cases of joint undertakings. In what case it will not exercise this power. *Jobe vs. O'Brien*, 34.
2. To decree a rescission of a contract on ground of misrepresentation of quality and quantity of land sold. When this power will not be exercised. See LIMITATIONS. *Peck vs. Bullard*, 41.
3. To decree perpetual injunction against the removal of personal property, and to arrest by attachment and punish by imprisonment for contempt in violating its decrees. Answer of defendant to interrogatories may be disproved in chancery. See ATTACHMENT FOR CONTEMPT. *Underwood's Case*, 46.
4. To divest one individual of title and vest it in another. When it will not exercise this power. See VENDORS AND PURCHASERS, Title, Statutory. *McConnell vs. Commissioners*, 53.
5. To rectify mistakes in deeds, bonds, &c., and to restrain a defendant in a court of law from setting up as an estoppel, a recitation in a deed made by mistake. *Helm vs. Wright & Graham*, 72.
6. To decree a perpetual injunction against the collection of a judgment founded on a note, the condition of which had failed. When negotiated in the due course of trade, when not. *Petty vs. Hannum*, 102.
7. To decree a perpetual injunction against sale of slaves by execution. When this power will not be exercised for want of registered title in complainant. See REGISTRATION. *Johnson & Heam vs. Morgan, Allison & Co.* 115.
8. To decree a specific execution of a contract to convey land: and herein of the defence of a parol rescission of the contract. *Walker vs. Wheatly*, 119.
9. To decree injunction against action of ejectment until defendant pay the value of improvements made by contract be

JURISDICTION OF CHANCERY COURT.—*Continued.*

- paid for, or received out of the rents and profits. See COVENANT. *Bream, et als. vs. Dickerson, et als.* 127.
10. To decree the sale of real estate for the purchase money, on the ground of lien retained. When the power will not be exercised. See VENDORS and PURCHASERS. *Campbell vs. Baldwin*, 145.
 11. To restrain the defendant in a suit at law from setting up a release. See CHANCERY. *Bell vs. Steel*, 148.
 12. To protect property which remains *sub judice*, and to abate nuisances thereupon. See CHANCERY. *Leake vs. Cannon, et als.* 169.
 13. To enforce the specific execution of contracts and to quiet possession; when enforced. A promise to give will not be enforced on the ground of possession delivered and improvements made. *Ridley, et ux. vs. McNairy, et als.* 174.
 14. To decree at the instance of administrator, who is a judgment creditor, partition and sale of estate of intestate for satisfaction of administrator's judgment. *Coleman vs. Pinkard, et als.* 185.
 15. To decree the surrender of slaves and other personal property and an account for hire. See FEME COVERT. *Perry & Patterson, adm. vs. Gill, ex.* 218.
 16. To decree an account against administrators and their securities in favor of distributees, when administration is granted in several States; how far these trusts are distinct and independent of each other. See ADMINISTRATOR. *Keaton's distributees, vs. Campbell, et als.* 224.
 17. To decree relief where the obligee has been prevented from suing at common law; and herein what does and what does not discharge the securities of an administrator under the act of 1813, ch. 119. See SECURITIES. *Harrison, et als. vs. Turbeville*, 242.
 18. To decree a sale of real estate for the satisfaction of purchase money; and herein of the lien of vendor and of the evidence of the waiver thereof. See VENDORS and PURCHASERS. *Campbell vs. Baldwin, et als.* 248.
 19. To decree deeds void for fraud, and to subject the estate therein conveyed to the satisfaction of judgment creditor, and herein of multifariousness arising from joining defendants having no connection with each other. See MULTIFARIOUSNESS. *Johnson vs. Brown & Smithers*, 327.
 20. To decree a specific performance of a bond for conveyance of title to real estate; and herein what constitutes a good consideration and notice to successive vendees. See

JURISDICTION OF CHANCERY COURT.—*Continued.*

VENDORS and PURCHASERS. *Macon & Bailey vs. Shepard*, 335.

21. To decree a perpetual injunction against the organization of a county under an act of assembly, which violated the provisions of the constitution. SEE CONSTITUTIONAL LAW. *Bradley vs. Commissioners, &c.*, 428.
22. To decree perpetual injunction against sale of slave by execution. The law of the place where the contract is made governs in reference to personal property, not the law of the place where the *thing* is situated. *Dougherty vs. Curle*, 435.
23. To decree an account between partners; and herein of the property purchased by one partner with the proceeds of the partnership. When it shall and when it shall not be taken into the account as partnership property. See PARTNERS. *Hunt & Co. vs. Benson*, 459.
24. To decree perpetual injunction against sale of real and personal estate by execution, and to set up a deed made in contemplation of marriage, and herein of the registration of such deeds under the acts of 1785, ch. 12; 1831, ch. 90. The act of 1785, ch. 12, applies to creditors of grantor. See *Baldwin vs. Baldwin et als.* 473.
25. To decree the surrender of slave adversely held. Complainant's right must however be clear and unquestionable to the slave, or this branch of jurisdiction will not be exercised. *Martin vs. Fancher*, 510.
26. To decree sale of real estate, which had been mortgaged by one partner in the firm name, for the purpose of indemnifying an endorser against a liability for the firm; and herein of power of one partner to bind another by deed; and what power a continuation of a partnership for purposes of liquidation carries with it. See PARTNERS. *Napier vs. Napier & Catron*, 534.
27. To decree an account against an administrator in favor of distributees, and herein of the capacity of an unnaturalised foreigner resident in the State to inherit personalty. *Polk vs. Ralston*, 537.
28. To decree a perpetual injunction against the collection of a judgment founded on a note without consideration, and herein of a transfer not in due course of trade, &c. *Hill vs. Crosby*, 545.
29. To decree perpetual injunction against the permanent appropriation of the land of an individual for highway purposes by a chartered company, where the appropriation is

JURISDICTION OF CHANCERY COURT.—Continued.

not in reasonable conformity with the charter. What is reasonable conformity? *Hadley, et ux. vs. H. T. Co.* 558.

30. To decree distribution to those entitled, and herein of a *devastavit* committed by executor in the payment of debts barred by the statute of limitation, and what constitutes a special request for delay under the provisions of the act of 1789, ch. 23, sec. 5. *Puckett vs. James*, 565.
31. To attach goods which were sold and delivered upon condition, (the condition not having been complied with,) and the goods fraudulently conveyed; and to declare the deed fraudulent and subject the goods to the satisfaction of vendors' claim. *Saunders & M. vs. Turbeville, et als.* 272.

JURISDICTION OF JUSTICE OF THE PEACE.

See JUSTICE, 1.

JUSTICE OF THE PEACE.

1. Justice of the peace has no jurisdiction against an endorser for any sum over fifty dollars. *Crockett, Harper & Co. vs. Wright*, 322.
2. The party aggrieved in a proceeding by a garnishment before a justice of the peace has a right to appeal as in other civil cases. *Clark vs. Williams*, 304.

LANDLORD AND TENANT.

1. Tenant shall not dispute the title of his landlord. *Washington vs. Conrad*, 562.
2. See *Bullard vs. Copps*, 409.

LAND WARRANT.

See ENTRY.

LAW AND FACT.

See CONSTITUTIONAL LAW.

LEASE.

1. See LANDLORD AND TENANT.
2. See CHAMPERTY, 5, 6.

LEVY.

1. A levy in the following words, "levied on lot No.—, in the town of Greenville, with its improvements," is void for uncertainty, and a sale and deed made by virtue thereof, conveys no title to the vendee. *Brown vs. Dickson*, 395.
2. The section of the act of 1794, ch. 1, requiring a levy first to be made on the personalty of the defendant was enacted

LEVY.—Continued.

for the benefit of the defendant and may be waived by him.
Trigg vs. McDonald, 386.

3. See **SHERIFF**.

LEWDNESS.

See **CRIMINAL LAW. MISDEMEANOR.**

EX LOCI.

See **CONTRACT.**

LIBEL.

1. Any malicious publication expressed by printing or writing, by pictures or signs, tending to injure the character of an individual or diminish his reputation, is a libel. *Dunn vs. Winters*, 512.
2. The fact of the publication of a libellous statement, is *prima facie* evidence of malice. *Ibid.*
3. Whenever the author of an alleged libel, acted in the *bona fide* discharge of any public or private duty, whether legal or moral, or in the prosecution of his rights or interests, no action can be maintained against him, without proof of malice in fact. *Ibid.*
4. Winters expressed the opinion, founded on the statements of others, that Dunn had maliciously killed his horse, and was arraigned therefor by Dunn before a church judicatory, and thereupon produced, in self-defence, the certificates of the individuals upon whose authority he made the statements. Held, in the absence of proof of malice in fact, no action for a libel would lie. *Ibid.*
5. There are matters of defence in actions for a libel or slander, which, though admissible in evidence under the general issue, may be also specially pleaded. Whenever the occasion of the speaking or publishing furnishes a defence to the action, it seems it may be specially pleaded. *Ibid.*

LIEN.

1. Of vendor on land for purchase-money. *Roberts vs. Rose*, 145.
2. Of vendor and the evidences of an intent to retain or abandon the lien. *Campbell vs. Baldwin, et als.*, 253.
3. Of jailor on runaway slave detained by him, for his prison fees. *Fowler vs. Norman*, 385.
4. Of partner on the effects of partnership. *Hunt & Co. vs. Benson*, 461.
5. Of judgments upon real estate. *Reid vs. House*, 581.
Jobe vs. O'Brien, 34.

LIFE ESTATE.

See REMAINDER.

LIMITATION ON SUITS.

1. Where a bill was filed by vendor of land after the lapse of nine years from the date of the conveyance, to rescind such contract on the ground of misrepresentation of the quantity and quality of the land by the vendee: Held, that the complainant was not entitled to relief, though the bill was filed within seven years after the discovery of the fraud, there having been no misrepresentation of any facts by which the complainant could have been prevented from obtaining a full knowledge of his rights at any moment of time. *Peck vs. Bullard*, 41.
2. A garnishee may defend himself by the statutes of limitation or by any defence he has against the suit of his creditor. *Hinkle vs. Currin*, 137.
3. Hinkle acknowledged that he had transferred his stock in a banking institution to evade responsibility to the creditors of the institution: Held, that this was not such an acknowledgement of a subsisting debt as would avoid the operation of the statute of limitations. *Ibid.*
4. To enable the plaintiff to protect himself from the operation of the statute of limitations, by the saving in favor of accounts concerning the trade of merchandize between merchant and merchant, their factors or servants, the subject matter of the account must be concerning the trade of merchandize between merchant and merchant, their factors or servants, and there must be mutual and reciprocal accounts between the parties. *Price vs. Upshaw*, 142.
5. A grant for land gives the grantee a constructive possession, which continues until an actual adverse possession commences, and such adverse possession must be continued seven years before the grantee loses his right of possession. *Smith vs. McCalls' heirs*, 163.
6. Where two grants covered in part the same land and actual adverse possession had been held under the younger grant more than seven years, but such possession was of a portion of the younger grant not included in the bounds of the elder grant: Held, that the statute of limitations did not protect the defendant in the possession of land included in the elder grant, which had not been actually adversely held for seven years. *Ibid.*
7. When the statute of limitations has once run against a debt, the cause of action is extinguished. *Muse vs. Donaldson*, 166.

LIMITATION OF SUITS.—Continued.

8. No promise made by a partner after a dissolution of the partnership, will bind another member of such firm, so as to take a case out of the statute, or stop its operation where it has not run. *Ibid.*
9. Margaret Gibson obtained letters of administration, with the will annexed, upon the estate of William Gibson, deceased; she was also sole legatee: Held, by the court, that whether she held the property after two years as devisee or as administratrix, was a question properly referable to the jury; and the jury having decided that she held the slaves as devisee, the statute of limitations would commence running, though the will should be afterwards set aside and letters of administration granted. *Winton vs. Rogers*, 178.
10. Where the statute of limitations operated in favor of a devisee, and the will under which such devisee claimed the property and held possession was subsequently set aside: Held, that it could not divest rights acquired by the statute. *Ibid.*
11. Limitation, statute of, protecting occupant possessions. See OCCUPANT CLAIMS.
12. See CHAMPERTY.
13. Payment by an administrator or executor of a debt, barred by statute of limitations a *devastavit*. *Pucket vs. James*, 565.
14. When debt not barred by reason of special request for delay by executor or administrator. *Ibid.*

MALICIOUS MISCHIEF.

See CRIMINAL LAW. MISDEMEANOR.

MANDAMUS.

See 25, 330, 264.

MASTER AND SLAVE.

If a slave or servant commit a trespass by the command or encouragement of the master, the master is guilty of the trespass. *Wilkins vs. Gilmore*, 140.

MASTER AND APPRENTICE.

See APPRENTICE.

MERCHANTS' ACCOUNTS.

See LIMITATIONS, 4.

MISDEMEANORS.

See CRIMINAL LAW. MISDEMEANORS.

MOTION.

1. Acts of Assembly changing the common law mode of proceeding, and giving a summary remedy by motion, must be strictly construed. *Baker & Hunter vs. Agey*, 14.
2. Motion by officer on bond of indemnity. *Ibid.*
3. Motion against sheriff for permitting escape of debtor arrested by *ca. sa.* *Williamson vs. Webb*, 136.
4. Motion against sheriff for false return of *fi. fa.* *Trigg vs. McDonald*, 386.
5. Motion against sheriff for failure to return a *fi. fa.* 390.
6. Motion for judgment on *ca. sa.* bond. 445.
7. Motion against sheriff for an insufficient return. 449.
8. Motion against sheriff for taxes. 421.
9. Motion to direct the sheriff to pay money collected by *fi. fa.* to the equitable owner thereof, such equitable owner not being plaintiff in the execution; under what circumstances court have not the power to do so. See **SHERIFF**. See *Atkinson vs. Cooper*, 365.

MULTIFARIOUSNESS.

See **CHANCERY**, 22, 23, 24. See *Johnson vs. Brown, et als.* 327.

NECESSARIES.

See **INFANT**.

NEGOTIABLE PAPER.

1. The circuit judge charged the jury, that the testimony of the notary, (who stated that he had made enquiry of persons who, he supposed, knew the residence of an endorser, and got the best information he could obtain,) was not sufficient evidence of the requisite diligence to charge an endorser who had removed his residence: Held, that the judge invaded the province of the jury, in deciding upon the sufficiency of the testimony. *Farmers & Merchants' Bank vs. Harris*, 311.
2. Where the court charged the jury, that when the distance between the residence of the holder and endorser is near and the communication frequent, in legal contemplation the holder would be presumed to have notice of the removal of an endorser: It is held, that this was trenching upon the province of the jury. This was a question of the weight of evidence to be decided by the jury. *Ibid.*
3. A justice of the peace has no power to render judgment against an endorser for any sum exceeding fifty dollars. *Crockett, Harper & Co. vs. Wright*, 322.

NEGOTIABLE PAPER.—*Continued.*

4. If the holder of a promissory note wish to render the estate of a deceased testator liable on his endorsement, he must give notice of his intention to look to the estate for payment, as in other cases, though the executor of the estate be the maker of the note. *Alton, et als. vs. Robinson's Ex.* 341.
- 5 The want of an averment of demand and notice in a declaration against an endorser is not cured by verdict. *Ibid.*
6. Non assumpsit without an affidavit of its truth does not put in issue an endorsement. 493.
7. On the trial of action of assumpsit against the endorser of a bill of exchange: Held, that the plaintiff had the right to strike out the name of an endorsee and insert his own name upon proof made that the bill of exchange belonged to plaintiff, and that it was made payable to said endorsee, for the purpose of facilitating the safe transmission of the bill and the collection thereof. *Union Bank vs. Carr*, 345.
8. A neglect to give notice to the drawer of a bill of exchange of the non-acceptance and protest thereof, may be waived by a payment of part or promise to pay, if such payment or promise to pay, is made with knowledge of the facts by the drawer by which he was discharged. *Martin vs. Ewing, et als.*, 559.
9. Such promise to pay, or part payment, with knowledge, amounts to an admission that the bill of exchange has been duly presented, dishonored, and due notice thereof given; and if proved, sustains a declaration in the usual form charging due presentment, protest and notice. *Ibid.*
10. Where a bill was protested for non-acceptance and the drawer discharged by the failure of the holder to give notice, and without a knowledge of his discharge, promised on a new consideration that he would pay the bill: Held, that he was liable on a special count, stating the facts, but not on a count charging due presentation, protest and notice. *Ibid.*
11. If negotiable paper is transferred for a valuable consideration and without notice of any fraud, the right of the holder shall prevail against the true owner, and this to favor the circulation of commercial paper. *Van Wyck vs. Union Bank*, 192.
12. This rule does not, however, prevail, where the holder has parted with no value nor incurred any new responsibility on the faith of such paper: and therefore where the holder receives a note or bill in payment of, or as security for a pre-existing debt, he is not entitled to the proceeds thereof

NEGOTIABLE PAPER.—Continued.

against the true owner, though he may have received it without notice of the claim of the true owner. *Ibid.*

13. Van Wyck drew a draft on Tilford in favor of Norvell, which was accepted by Tilford; Norvell gave Van Wyck an order on Tilford for the draft, in consideration of certain notes put in the hands of Norvell, which were to be the property of Norvell, if the order procured the draft. The draft was not returned, but without authority was transferred to Gill, Campbell & Co., as collateral security for a by Van Wyck: Held, that Van Wyck, having paid the draft to the holders and apparent owners, without notice of their defect of title thereto, was entitled to the notes. *Ibid.*
14. See *Hill vs. Crosby's Adm.* Defence in equity against negotiated paper, 545. See also *Petty vs. Hannum & Drane*, 102.
15. An action of debt will lie jointly against the maker and endorsers of a promissory note. *Planters' Bank vs. Tappan*, 95.
16. When an endorser has died, notice must be given to his personal representative. *Planters' Bank vs. White*, 113.

NEW TRIAL.

The court will award a new trial to a defendant in a criminal case where incompetent evidence has been admitted, though it may be satisfied that the verdict is correct. *Peek vs. The State*, 78.

NON-ASSUMPSIT.

The plea of non-assumpsit does not put in issue an endorsement unless it is sworn to, 493.

NON-EST FACTUM.

Plea of *non-est factum* on the ground that the instrument was not delivered. See *Hill vs. Crosby's Ad.*, 547.

NON-SUIT.

A writ of error will not lie from a voluntary non-suit. *Union Bank vs. Carr, et als.*, 345.

NOTE, PROMISSORY.

1. An acknowledgment of indebtedness implies a promise to pay and constitutes the writing containing it a promissory note. *Cummings vs. Freeman*, 143.

2. See **NEGOTIABLE PAPER.**

NOTICE.

1. Notice of injunction. *Underwood's case*, 47.
2. Notice of outstanding title. 50.
3. Notice of the right of a man of color to his freedom a circumstance in aggravation of damages. *Woodfolk vs. Sweeper*, 90.
4. Notice of the failure of the consideration of a note purchased. *Petty vs. Hannum & Drane*, 102.
5. When a constructive admission of notice by a partner does not operate against the other co-partner. 102.
6. Notice to an administrator or executor, when endorser is dead. *Planters' Bank vs. White*, 112.
7. Corrected registration operates as notice only from date of correction. *Baldwin vs. Marshall*, 116.
8. The right of holder of negotiable paper for value without notice of equitable defence shall prevail. *Van Wyck vs. Norvell*, 194.
9. Notice to subsequent vendee of non-payment of purchase-money by recital in deed. See VENDORS and PURCHASERS, 10, 11, 12.
10. Notice to an endorser who has changed his residence. See ENDORSER. See *F. & M. Bank vs. Harris*, 311.
11. Notice by security to principal to sue. How proven. *Miller vs. Childress*, 320.
12. Notice of an outstanding equity subjects each successive vendee of legal title to such equity. Possession when notice. *Macon and Bailey vs. Sheppard*, 335.
13. The maker of a note was executor of the endorser: Held, that notice to the executor was necessary. 341.

NUISANCE.

1. A nuisance may be abated by order of chancery court. See *Leak vs. Cannon*, 169.
2. A public nuisance is indictable and no length of time legitimates such nuisance. See *Elkins vs. The State*, 543.
3. A riparian proprietor has a right to divert the water of a stream from its natural channel, and use it higher or lower than the natural channel, provided he return the water to its natural channel before it leaves his land. *Webster vs. Fleming*, 518.
4. Where upper proprietor diverted the water of a stream from its natural channel, by means of an artificial channel, and placed his mill on such artificial channel at a lower

NUISANCE.—*Continued.*

point than could be obtained in the natural channel, and the wheels of his mill were overflowed by the back flowage of a dam below: Held, that the proprietor of the mill below had no more right to impede the operation of the upper proprietor so situated, than he had to overflow his lands. *Ibid.*

OBLIGOR.

1. Obligor struck out of the bond the name of the co-obligor: Held, the co-obligor was liable in equity, 242. See also, 520.
2. Obligor discharged by release of co-obligor without the consent of obligor, 148.
3. See SHERIFF. See 490.

OCCUPANT CLAIMS.

1. See ENTRY.
2. Where an act of the assembly provided that the office of entry-taker should be open for the reception of entries from and after the 1st day of January, 1838, until the 1st day of January 1839, *it seems*, that the office was not open for the reception of entries on the said 1st day of January, 1839. *Chester vs. Hubbard & Anderson*, 354.
3. The 11th section of the act of 1837-8, protects a possession of three years against an entry by a warrant-holder, though the possessor may not be able to produce legal proof of an occupant claim or of the assignment thereof to himself. *Ibid.*
4. The statute of 1837-8, ch. 1, provides that the office of entry-taker shall be open for the reception of general entries by warrant until the 1st day of January, 1832, and also provides that an occupant shall be allowed till the 1st day of January, 1839, to prove his occupancy and spread it upon the general plan indicating the land as appropriated: Held, that the occupant would be entitled to the last moment the office was open for the probate of his occupancy, and that there was no period of time at which the entry taker could legally receive an entry by a warrant-holder upon the land. *Ibid.*

OFFICE BONDS.

See SHERIFF. See also, *Goodrum vs. Carroll*, 490.

PARENT AND CHILD.

1. If a parent in chastising his child exceed the bounds of moderation, and inflict cruel and merciless punishment, he is a

PARENT AND CHILD.—Continued.

trespasser and liable to be punished by indictment. *Johnson, et ux. vs. The State*, 283.

2. It is not the infliction of punishment which constitutes the offence, but the excess; and what shall be regarded as excessive, is not a conclusion of law for the court to announce, but is a question of fact for the determination of the jury. *Ibid.*
3. Where the circuit judge, after reciting certain facts as stated by witnesses, told the jury if they believed the statements of these witnesses, then the chastisement inflicted by the parent exceeded "the bounds of moderation and reason, and was barbarous in the extreme:" Held, that this was making what constituted excess of punishment a conclusion of law, was an invasion of the province of a jury, and therefore erroneous. *Ibid.*

PAROL.

Parol rescission of written contract when pleadable in bar of bill for specific performance. See **EVIDENCE**, 5.

Parol, promise to give, not enforceable in Chancery. See **CHANCERY**, 11.

PARTIES QUASI.

See **CHANCERY**, 10.

PARTNERS.

1. A promissory note was executed to James Shelton & Co. James Shelton assigned the note to McLaurin in his own name: Held, that such assignment did not pass the legal interest in the note to McLaurin. It should have been assigned in the name of the firm. *McIntire vs. McLaurin*, 71.
2. A decree *pro confesso* on a bill, charging notice of failure of the consideration of a note, against one partner does not estop the other partner from proving want of notice. *Petty vs. Hannum & Drane*, 102.
3. Kay, Thomas & Co. instituted an action of assumpsit against Vanzant as the maker of a promissory note signed "Vanzant & Hyder," and made by Hyder; plaintiffs introduced Hyder as a witness: Held, that he was incompetent to prove that himself and Vanzant were partners at the time of the execution of the note, he being interested in rendering Vanzant responsible for half of the note; but that he was competent (the partnership being proven) to establish the other part of plaintiff's case; as to the justice of the demand and the like. *Vanzant vs. Kay, Thomas & Co.* 106.
4. No promise made by a partner after the dissolution of the

PARTNERS.—Continued.

- firm will take a debt out of the statute of limitations or stop its operation where it has not run. *Muse vs. Donelson*, 166.
5. A partner has not the right to bind the firm by any contract not for the benefit of the firm, and legitimately within the line of its operations. *Whaley vs. Moody*, 495.
 6. An endorsement of the firm name by one of the members of the firm, for the accommodation of a third person, does not bind the other members, unless the note should get into the hands of a holder for valuable consideration without notice. *Ibid.*
 7. Hunt & Co. by the terms of a partnership agreement, were to furnish the capital. Benson agreed to conduct the establishment, to be liable for half the expenses and losses, and pay interest on half the capital furnished from the commencement to the termination, when the profits were to be equally divided: Held, under this agreement,
 1st. That until the debts of the partnership were paid and the partnership settled, each partner had a lien on all the partnership property as his indemnity against the joint debts of the firm and his security for the ultimate balance due him.
 2. That neither partner could without the consent of his co-partner or co-partners withdraw any portion of the funds of the concern for private purposes, (personal expenses excepted,) or acquire an exclusive right to any portion of the stock until the debts were paid and the partnership settled. *Hunt & Co. vs. Benson*, 459.
 8. Where real estate is purchased for partnership purposes, and on partnership account, equity deems it partnership property, no matter in whose name the purchase is made, or whether the legal title be in one or in all. *Ibid.*
 9. Where real estate is purchased and paid for with partnership funds, such payment will be decisive, in the absence of countervailing circumstances that it was intended to be held as partnership property. *Ibid.*
 10. If one partner withdraw the funds of the firm under such circumstances of consent, or knowledge and acquiescence on the part of the co-partners as to amount to a contract or loan, the property so purchased will not belong to the firm, but will be the private estate of the person so purchasing. It is otherwise if the circumstances do not amount to a case of contract or loan, although the partner may purchase for his own use and take title in his own name. *Ibid.*
 11. Where a partner withdraws partnership funds and appropriates it to private purposes, such as the purchase of real

PARTNERS.—Continued.

estate, and makes in the books of the concern full and fair entries thereof, which do not disguise the transaction and furnish to the co-partner full information of the true state of the facts, the consent of such co-partner, if he have access to the books, to the withdrawal and appropriation of the funds, will be implied unless he make objection at the time. His consent, however, could not be implied if he did not have access to the books, as where he resided a thousand miles from where the books were kept and the transaction took place. *Ibid.*

12. A joint action will lie against surviving partner and the representative of the deceased partner. *Simpson & Choat vs. Young, et als.* 514.
13. The power of a partner to bind his co-partner ceases on the dissolution of the firm. *Martin vs. Kirk, et als.* 529.
14. After a dissolution of a partnership, no individual of the dissolved firm has a right to bind another member by endorsing the firm name, though it be for the purpose of renewing the existing notes of the dissolved firm. *Ibid.*
15. When a firm is dissolved, each member of the dissolved firm, if his power be not restrained by the terms of the article of dissolution, may acknowledge in the name of the firm all just accounts, not barred by the statute of limitations, sign and receive receipts for monies received and paid in the name of the firm; and the firm will be bound thereby. *Ibid.*
15. Where the members of a dissolved firm, in the publication of notice of their dissolution, used the following language, "Either of the parties are authorised to use the name of the firm in liquidation, only, of past business:" Held, that this did not authorise the parties to renew a note given by the firm for a partnership debt, nor confer upon any of the parties powers which they did not possess by law. *Ibid.*
16. One partner has no power to bind his co-partner by deed, unless he be expressly empowered to do so by deed, and that power cannot be proved by parol. *Napier vs. Catron, et als.* 534.
17. A power to bind a co-partner by deed is not a stipulation of the partnership, though such power be inserted in the articles of partnership. It simply authorises the use of each other's name in a mode and to an extent not authorised by the laws of partnership. *Ibid.*
18. Where partners authorised each other by a clause in the deed of partnership to bind each by deed, and the partnership expired by its own limitation, and thereupon, by writ-

PARTNERS.—Continued.

ten agreement it was continued for the purpose of winding up the business: Held, that such continuation did not carry with it the power to bind by deed, and that a mortgage on the real estate, executed by one of the firm for the purpose of securing a partnership liability, did not bind the other member of the firm. *Ibid.*

PAYMENT.

1. Payment not voluntary when made under the pressure of legal process. *Cocke vs. Porter's, ex.* 15.
2. Payment of a debt to a foreign administrator discharges the debtor. *Keaton's, distributees, vs. Campbell, 224.*
3. A payment by the Sheriff to the plaintiff in the execution without the knowledge of equitable ownership, is good. *Atkinsou vs. Cooper, 361.*
4. What amounts to a payment and discharge of *fi. fa.* See *Harwell vs. Worsham, 424.*
5. Payment to the holder and apparent owner of negotiable paper without notice of defect of title, good. *Van Wyck vs. Union Bank, 192.*

PETITION IN CHANCERY.

See CHANCERY, 10.

PLEADINGS IN CHANCERY.

1. Where defendants in answer to a bill set up the plea, that they are innocent purchasers for a valuable consideration, and there is nothing to contradict such answer, such plea so set up must prevail, and the bill be dismissed. *McConnell vs. Commissioners of Madisonville, 53.*
2. A *pro confesso* decree against a partner, does not estop a co-partner from pleading a want of notice to a bill charging notice upon both. *Petty vs. Hannum and Drane 102.*
3. A parol rescission of a contract to convey land, executed, may be pleaded in bar of a bill for specific performance. *Walker vs. Wheatly, 124.*
4. The answer of a corporation is by its corporate seal, not on oath. *Van Wyck vs. Norvell, 192.*
5. When the answer sets forth a state of facts which entitles the complainant to a decree, the court will enter up such decree, though the bill may not make out the case by its allegations. *Jameson vs. Shelby, 178.*
6. When a bill is multifarious. See *Johnson vs. Brown, 329.*

PLEADINGS AT LAW.

1. The garnishee is entitled to every defence he has against his creditor. *Hinkle vs. Currin*, 137.
2. Barry became a member of a club, which had previously rented a room: Held, that he was not liable for the rent, either before or after he became a member upon a special contract or a count in *indebitatus* or *quantum meruit* for work and labor done. *Barry vs. Nuckolls*, 324.
3. Plea in abatement to the jurisdiction of the court in case of writs against defendants resident in different counties. *Rich vs. Ruyle*, 404.
4. Where, from the nature of the agreement, a special demand is necessary, but the demand is not averred in the declaration, such omission will be cured by verdict, and the formal "*sæpius requisitus*" held sufficient; and this upon the ground, that a recovery would not have been suffered by the court, unless a special request had been shown in proof. *Rogers vs. Love*, 417.
5. Pleading in Slander and Libel.
See SLANDER; LIBEL.
6. Plea to *scire facias*.
See *Nicholson vs. Patterson*, 448.
7. Declaration against a drawer of a bill of exchange, who is discharged by want of notice, and who promises on a new consideration to take up the bill: How declared against. See NEGOTIABLE PAPER, 8, 9, 10.
8. In an action instituted in the name of Trezevant on a covenant executed by McNeal to Trezevant, McNeal pleaded that Trezevant had assigned and transferred the covenant to one G. H. Wyatt, and that Wyatt was the true owner thereof; Trezevant demurred: Held by the court, that the demurrer admitted the fact, that plaintiff had no interest in note, and the suit was, therefore, wrongfully prosecuted: Held, that a replication by the plaintiff, averring that the suit was prosecuted for the benefit of Wyatt, would have been a good answer to defendant's plea. *Trezevant vs. McNeal*, 352.

POSSESSION.

1. When possession of real estate is notice to vendee. See *Macon & Bailey vs. Sheppard*, 335.
2. See LIMITATION; CHAMPERTY.
3. When the possession of personal estate by the party who conveys in trust is not fraudulent. *Saunders & Martin vs. Turleville, et als.* 272.
4. See OCCUPANT CLAIMS.

PROBATE.

1. Probate of Will. See **WILL**.
2. It is not necessary that the witnesses to a deed confirming a previous deed should say that the person signing the deed of confirmation was the identical individual who signed the deed intended to be confirmed. All that is necessary for them to prove, is, that the person who acknowledged the deed of confirmation was the individual whose name was subscribed to the paper which they were in the act of proving. *Crockett vs. Campbell*, 411.

PROCESS.

See **SHERIFF**; **COUNTERPART**; **CA. SA.**

PROCESSIONING.

1. In order to bind a man by a processional survey, an authority from such man to the surveyor must be proved, and in the absence of proof the presumption of law is, that it is unauthorised. *Overton's heirs, vs. Cannon*, 264.
2. Where the deputy surveyor and Overton, whose land was about to be surveyed under the act of 1806, disagreed and applied to the principal surveyor for his instructions, and the principal surveyor directed the survey to be completed according to the mode insisted on by the deputy, which mode was illegal, and thereupon Overton abandoned the further prosecution of the survey: Held,
 1. That a countermand of survey was not necessary: and,
 2. If it were, a refusal to have any thing more to do with the survey, would, in the absence of other proof, be sufficient to establish such countermand. *Ibid.*
3. If an individual recognizes and adopts a processional survey as establishing the boundaries of land, this recognition and adoption shall bind him; and this is so, though he may not have accompanied the surveyor and assented to his processional survey at the time. *Ibid.*
4. A man shall not be estopped from claiming his just and legal rights by a hasty, ill-advised and momentary recognition or adoption of a line which has been illegally run; and, therefore, the circuit judge erred, when he charged the jury, "that if the defendant recognized or adopted the processional line, it would bind him, although he had recognized it only one day." *Ibid.*
5. A grantee who neglected to have his land processioned in accordance with the act of 1819, is not bound by an erroneous *procession* made by the surveyor, and estopped thereby from claiming to his true line. *Sheppard vs. Johnson*, 285.

PROMISSORY NOTE.

1. Cummings executed and delivered to Freeman an instrument of writing in the following words: "Due Joseph J. Freeman, two hundred dollars, borrowed October 21st, 1836, W. C. Cummings:" Held, that the acknowledgment of indebtedness in this writing implies a promise to pay and constitutes it a promissory note. *Cummings vs. Freeman*, 143.
2. See **NEGOTIABLE PAPER**.

QUO WARRANTO.

See *Bradley vs. Commissioners of Powell*, 428.

REGISTRATION.

1. Johnson purchased slaves of Richmond, paid the purchase money, took a bill of sale of the slaves and received the possession of them: Held, that said slaves were subject to the execution claims of creditors until said bill of sale was registered: no title passed as against such creditors but by deed registered before the lien of the execution attached. *Johnson & Heam vs. Morgan, Allison & Co.*, 115.
2. A register who has made an incorrect registration of a deed, may correct such incorrect registration, and such register is a competent witness to prove the correction and the date thereof in any suit between third persons in regard to such deed. *Baldwin vs. Marshall*, 116.
3. Registration being intended to give notice to creditors and subsequent purchasers, such corrected registration would operate against such creditors and purchasers only from the date of the correction. *Ibid.*
4. Bruce sold to Tatum ten head of cattle, delivered them and executed a bill of sale for them to Tatum: Held, 1st, that a verbal sale of such property was good and vested a valid title in the vendee. 2nd. That when a bill of sale is taken for such property the statutes of registration do not require it to be registered. 3d. That a bill of sale having been taken, it was properly read to the jury as the best evidence of the contract. *Tatum vs. Jameson and Johnson*, 300.
5. If a party contract for personal property and the possession remain in the vendor so that no title passes except by deed, the deed must be registered or it is void as to creditors. *Ibid.*
6. A sale of a slave must be by deed registered; but the court have said that by construction the title passes by verbal contract and delivery, as between the parties, and that a deed registered is only necessary as against the creditors of the vendor. *Ibid.*
7. Mary, in contemplation of marriage, conveyed her estate, real and personal, in trust for her benefit: Held, that such deed was not embraced within the act of 1785, ch. 12, and

REGISTRATION.—Continued.

was not required to be registered by said act to secure such estate against the creditors of the husband, whether their debts were created prior to the marriage or subsequent thereto. The act applies to the creditors of the grantor only. *Baldwin vs. Baldwin*, 473.

8. The act of 1831, ch. 90, applies to deeds made after the passage thereof, and has no retrospective operation. *Ibid.*
9. Where a husband, with the consent of his wife, took possession of money, which, belonging to the wife before marriage, had been conveyed to a trustee for her benefit, which deed had never been registered, and such husband, with her consent, converted the money into property, and took titles thereto in his own name: Held, that the wife had no equitable claim upon such property, against the creditors of the husband. *Ibid.*
10. See CONSTITUTIONAL LAW, 16.

RELEASE.

A release of one obligor by the obligee operates as a discharge of the other. *Bell vs. Steel*, 148.

REMAINDER.

1. Haywood conveyed to his daughter Harriet and her assigns forever, land in consideration of \$1000 paid him, to be held during her natural life, and after her death, to such of her children, their heirs and assigns forever, as she and her first husband should direct, limit and appoint, and for want of such joint appointment to all her children equally, their heirs and assigns forever: Held,
 - 1st. That this deed vested in Harriet an estate for life with remainder over.
 - 2nd. That upon the birth of a son the remainder became vested in him, subject to be divested by the birth of other children, or by the exercise of the power of appointment.
 - 3d. That the consideration expressed in the face of the deed must be regarded as the true and only consideration moving to the execution thereof, in the absence of evidence to the contrary, and that the land must therefore be regarded as purchased by the mother, the life estate for herself, and the remainder for her children.
 - 4th. That said remainder having been purchased by the mother for the child, and conveyed to him directly, was therefore derived from the mother within the meaning of the act of 1784, ch. 22, sec. 7, and consequently, upon the death of the son, intestate, without issue, vested in the mother, thus uniting the life estate and remainder and giving her a fee simple.
 - 5th. That the mother having died, intestate, without issue,

REMAINDER.—*Continued.*

- the estate descended to her brothers and sisters. *Haywood's heirs vs. Moore*, 584,
2. A limitation in remainder of personal chattels by deed is good in Virginia and Tennessee. *Hughes vs. Cannon*, 589.
 3. Winn loaned and delivered a slave to Hughes and wife, to be and remain in the personal service of the wife during the life of the wife, and after her death to go to such child or children or heirs surviving at the death of the wife as might have attained or might attain the age of 21 years. Held, that such deed conveyed to the wife a valid life estate with remainder to her son who attained the age of 21 years, the said deed not falling within the rule in Shelly's case. *Ibid.*
 4. Felts bequeathed certain slaves to his wife for life, and at her death to his daughter Ann, wife of Sullivan. Sullivan having purchased the life estate, sold and delivered the slaves to Caplinger and died, leaving the tenant for life, and Ann his wife alive; Held, that on the death of the tenant for life, the slaves belonged to Ann Sullivan. *Caplinger vs. Sullivan*, 548.
 5. No assignment by the husband of reversionary choses in action, or other equitable interests of the wife, even with her consent and joining in the assignment, will exclude her right of survivorship, *Ibid.*

RENTS AND PROFITS.

See **CHANCERY**, 14.

RETAILING.

See **CRIMINAL LAW. MISDEMEANOR.**

RETURN.

See **SHERIFF**, 8, 9, 10, 11, 21, 22, 23.

REVERSAL.

1. See **CHARGE OF THE COURT.**
2. The damages returned by the jury in detinue for detention of a slave were greater than the amount claimed in writ and declaration: Held, that the court would not reverse if the plaintiff would release the overplus. *Goodman vs. Floyd*, 59.
3. In a criminal case the court will weigh the testimony and if not satisfied with the verdict they will reverse. *Daines vs. The State*, 439.
4. Where incompetent evidence was admitted, the court will reverse though it may be satisfied of guilt of defendant. *Peek vs. The State*, 78.

REVERSION.

See **REMAINDER.** See **COVENANT.**

SALE.

See **VENDORS** and **PURCHASERS.**

SALE CONDITIONAL.

See *Saunders & Martin vs. Turbeville, et als.* 272.

SCIRE FACIAS.

A *scire facias* is founded upon a record, and recites nothing that is not of record. *Nicholson vs. Patterson*, 448.

SECURITY.

SECURITY OF ADMINISTRATOR.

1. Where the securities of an administrator wish to be released from responsibility, the filing of a petition by such securities and the service of notice on the administrator, are required by the act of 1813, ch. 119, for the benefit of the administrator and not the distributees. The distributees are no parties to the proceeding; and, therefore, where the administrator comes in and waives the necessity of such petition and notice, the release of such securities is final and conclusive. *Harrison, et als. vs. Turbeville, et als.* 242.
2. Where an administrator procured his bond from the clerk's office and struck out the name of one of the obligors and inserted therein the name of another person: Held, that the person whose name was so stricken out was still in equity a party to the bond and bound by all its obligations, and that the erasure did not affect the liability of the co-obligors. *Ibid.*
3. A court of chancery will give relief in all cases where the bond has not been satisfied and the obligee is prevented from suing at common law by reason of its being lost or defaced, no matter from what cause, provided it be not by his own misconduct. *Ibid.*
4. The act of 1813, ch. 119, authorises the county court to discharge one set of securities from all previous as well as subsequent liability by substituting others in their stead. *Ibid.*
5. How far held responsible for effects obtained by the administrator by letters got out in another State; and herein of principal and ancillary administrations. *Keaton's distributees, vs. Campbell, et als.* 224.
6. The county court have no power to discharge a part of the securities in an administration bond, without, as necessary consequence, discharging the others, if the others do not assent. *Polk vs. Wisener, et als.* 520.

SECURITY.—Continued.

7. The county court have no power to release the securities in an administration bond, without making other provision for the security of the estate, and, therefore, where the court made an order discharging a part, without making further provision, such order of discharge was void, and all were liable on the bond. *Ibid.*
8. If securities petition for a discharge, and the administrator do not give other and sufficient securities, the court may take it out of the hands of the administrator and place the estate in the hands of the petitioner, or other fit person, and in such event the petitioning security is liable only for the past misbehavior of the administrator.

SECURITY IN BOND OR NOTE.

9. Where a statute is plain and explicit in its meaning, and its enactments within legislative competency, the duty of the court is simple and obvious, namely to say, *sic lex est scripta*, and obey it. *Miller vs. Childress*, 320.
10. The act of 1801, ch. 18, giving a right to securities to be discharged from a note or obligation upon the refusal of principal, after notification to sue, is in derogation of common law and must be strictly complied with. A notice not in writing, or proven by less than two witnesses, will not satisfy the statute. *Ibid.*
11. The proof of the execution of a bond by sheriff's securities must be by the records of the county court. No parol proof will be heard on the subject. *Bryan vs. Glass' securities*, 390.
12. Adams, a security in a bill single, confessed judgment in favor of the obligee and took judgment by motion against the principal: Held, that such judgment was valid. *Roberts vs. Rose & Matthews*, 145.

SET OFF.

When the legal title to a note does not pass by an assignment it cannot be used as a set off. *McIntire vs. McLaurin*, 71.

SEVERANCE.

The effect thereof on the competency of a witness. *Moffit vs. The State*, 99.

SHERIFF.

1. The act of 1825, ch. 40, providing that an officer shall have judgment by motion on a bond of indemnity against the principal and securities therein, does not extend to cases where the recovery is had by the defendant in the execution against the officer, but to those cases only, where the title to the property does not reside in the defendant, but

SHERIFF.—Continued.

in some third person who recovers the value thereof. *Hunter and Baker vs. Agey*, 14.

2. Where the sheriff permitted a defendant in a *ca. sa.* to escape, and motion was made against such sheriff under the act of 1803, ch. 18, sec. 3, for the amount of money specified in the *ca. sa.*: Held, that it was not necessary for the plaintiff to produce the sheriff's bond to authorize a judgment against him; his election, qualification, execution of a bond constitute him sheriff, and as such he is liable without reference to the bond. *Williamson vs. Webb*, 133.

3. A cause of action existed against the sheriff, so soon as he permitted the defendant in the *ca. sa.* to escape, and if a recorded bond were offered at the time of trial, it was admissible evidence against the sheriff and his securities, though it may not have been recorded at the time of the making of the motion. *Ibid.*

4. A court of law has a right in a summary way, to direct the application of money which has been paid into court. See *Atkinson vs. Cooper*, 361.

5. The plaintiff on record has a legal right to receive money on an execution in his name, and a payment of it to him by the sheriff, is a good discharge. *Ibid.*

6. Where the plaintiff on record, directs the sheriff to appropriate monies collected by him on an execution in the plaintiff's name, to the satisfaction of an execution in the sheriff's hands against the plaintiff, and the sheriff, in pursuance of such direction, without any knowledge that the plaintiff had disposed of his right to control such execution or the proceeds thereof, does appropriate the money to the satisfaction of such execution, and returns such execution satisfied: Held by the court, that such monies are beyond the reach of the court, and that the court has no power to order the return to be vacated, and the money paid to the equitable owner. *Ibid.*

7. Where slaves had been committed to the custody of a jailor as runaways and make their escape before the lapse of twelve months: Held, that the sheriff acquires no such lien upon them for his fees, as will sustain an action of detinue against a third person for the recovery of the possession of them. *Fowler vs. Norman*, 384.

8. The return of a sheriff to a *fi. fa.* must answer the whole writ. *Trigg vs. McDonald*, 396.

9. It does not follow that because the defendant in an execution may have had property in his possession during a part

SHERIFF.—Continued.

of the time the sheriff had the writ in his hands, the sheriff is guilty of a false return by returning "*nulla bona*." *Ibid.*

10. Whether the return was or was not false, in such a case, would depend upon whether the sheriff knew at the time he held the writ that the defendant had then goods in his hands, and whether he was or was not guilty, under all the circumstances of the case, of negligence in the failure to secure such goods and sell them for the satisfaction of the execution. *Ibid.*
11. If a sheriff fail to make a levy in due time to sell, and make the return, he is guilty of negligence, which subjects him to an action at the instance of the plaintiff in execution, but not to a motion for a false return. *Ibid.*
12. In case the plaintiff in the execution receives money collected on the writ, he thereby waives his right of action against the sheriff for a false return on that writ for the balance. *Ibid.*
13. The act of 1794, ch. 1, sec. 23, which directs the sheriff first to levy upon the goods and chattels of the defendant, if any there be, is for the benefit of the defendant, and if he waived the benefit thereof, a sale of the defendant's land would be good though there were no return endorsed on the writ of "*nulla bona*," and a return of *nulla bona* would not be necessary to protect him against an action for a false return at the instance of the plaintiff in the execution, provided he had made the money by a sale of defendant's land. *Ibid.*
14. Whether the bond given by a sheriff for the performance of his duties has been acknowledged and recorded according to law, must be determined by the records of the county court, and no parol proof can be heard on the subject. *Bryan, et als. vs. Glass' securities*, 390.
15. Where the record of the proceedings of the county court set forth that the sheriff "came into open court and entered into bond and security as the law directs:" Held, that such entry (the record being presumed to speak the truth) embraces every thing the law requires, and is competent record evidence, that the bond was properly executed, acknowledged and recorded. *Ibid.*
16. Where the clerk of the county court, by order of such court procured a book for the purpose of recording sheriff's bonds and other official bonds, and the bond of a sheriff was written out at length in said book by said clerk: Held, that said book was as much a record book as the minute-book, al-

SHERIFF.—Continued.

- though the entry of the bond therein was not signed by the justices. *Ibid.*
17. On a motion made on a collector's bond for unpaid balance of county taxes, it is not necessary that the county trustee should show that the bond was acknowledged before the county court and approved by that tribunal. The statute of 1835 only requires that the bond should be approved by the county court. Whether it was or was not approved by the county court is matter of defence. *Miller vs. Moore*, 421.
 18. Where the condition of a collector's bond was to collect and pay over the county taxes without saying to whom, such bond would be valid, notwithstanding, the law directing to whom the payment should be made. *Ibid.*
 19. The collector of county taxes against whom a motion is made for unpaid balance under the fourteenth section of the act of 1835, is entitled to a trial of the facts of his case by jury under the provisions of the fourteenth section of said act. If it be doubtful whether a defendant claiming the privilege of trial by jury under statutory provisions is entitled thereto, the defendant should have the benefit of that doubt, that mode of ascertaining disputed facts being so congenial with common law right and the cherished principles of our constitution. *Ibid.*
 20. The fact, that the court had discharged the jury at the time the application was made, is not good ground of refusal, for if the court had no power to summon a jury of talismen, a continuance should have been ordered. *Ibid.*
 21. If the return of a sheriff on a *fi. fa.* be not in point of law insufficient, that is, if it show an adequate legal reason why the money was not made, a motion will not lie. *Raines vs. Childress*, 449.
 22. If the sheriff has not used proper diligence, the remedy is by action. *Ibid.*
 23. Raines, sheriff, received an execution on the 30th June, 1841, returnable on the 13th of September, 1841. The sheriff endorsed on the execution, that he levied it on a negro, &c., on the 1st day of September, 1841, and took a bond for the delivery of slave, &c., on the 13th, the return day. The bond for delivery of the property was forfeited, and the forfeited bond, with the *fi. fa.* was filed on the return day: Held, that no motion would lie on this return, as it showed an adequate legal reason why the money was not made. *Ibid.*
 24. A bond executed by a public officer and his sureties, though

SHEIFF.—Continued.

not good as a statutory bond, may nevertheless be binding as a voluntary obligation, and an action at common law be maintained thereupon. *Goodrum, et als. vs. Carroll*, 490.

25. If a deed be delivered to a stranger for the use of the obligee, and he afterwards receive it, it is good from the time it was delivered to the stranger. *Ibid.*
26. If a bond be accepted by the obligee at the time of the plea, it is the deed of the obligor. *Ibid.*
27. The delivery of the bond of a sheriff, made payable to the Governor, for the performance of his official duties, to the clerk of the court, is a delivery to the Governor; and this is so, though such sheriff's bond be not in compliance with the statute under which it was taken. *Ibid.*
28. Where a constable or sheriff having an execution in his hands, pays the execution creditor without any contract for the purchase of the debt, it is an absolute discharge of the execution; and such constable or sheriff has no power to enforce the execution for his own benefit. *Harwell vs. Worsham*, 524.
29. Where a constable had executions in his hands against a defendant, and had against said defendant a debt of his own, not in execution, and obtained a slave for sale without directions as to the application of the proceeds: Held, that he was bound to appropriate the monies raised by sale of the slave to the satisfaction of the executions in his hands. *Ibid.*

SLANDER.

1. Where a plaintiff in a suit before a justice of the peace swore that his account was just and true, and that he had allowed all just credits, but did not state that there was no other person by whom he could prove his account: Held, the oath having been taken without objection, the incompetency of the plaintiff's evidence was waived, the oath was not extra-judicial, and the plaintiff was guilty of perjury in swearing to the account, if the oath was false. *Sharp vs. Wilhite*, 434.
2. It is not necessary to sustain a conviction for perjury that the oath under the book debt law should have been administered in the exact words of the act. All that is necessary is a substantial compliance with the prescribed form. *Ibid.*
3. Where a declaration in slander alleged that the discourse of the defendant was had concerning a trial between plaintiff and defendant before M. Douglass, a justice of the peace, and concerning an oath the plaintiff took on said trial be-

SLANDER.—*Continued.*

fore said justice of the peace in proving his account: Held, that the declaration sufficiently showed the existence of a suit before a competent tribunal, and that the oath taken was as to material matter in issue. *Ibid.*

4. See LIBEL.

SLAVE.

1. Trespass committed by slave by command of master, master liable. See TRESPASS, 2. *Wilkins vs. Gilmore*, 140.
2. Assault on free white woman with intent to ravish. See CRIMINAL LAW. FELONY.
3. Assault by a slave on a free white man with intent to commit murder in the first degree. See CRIMINAL LAW. FELONY.
4. Slave, runaway. See SHERIFF, 7

SPECIFIC ARTICLES.

See *Rodgers vs. Love*, 417.

SPECIFIC PERFORMANCE.

1. A parol rescission of a written contract which has been fully executed by the parties is good in bar of an application for a specific performance. *Walker vs. Wheatley*, 119.
2. A parol promise to give real estate possession taken by virtue of such promise and valuable and permanent improvements made with the consent of the owner furnish no ground for a decree enforcing the promise. *Ridley, et ux. vs. McNairy, et als.* 174.
3. See CHANCERY. See *Macon & Bailey vs. Sheppard*, 335.

STATUTE AFFIRMATIVE.

Giving power to institute joint action where parties reside in different counties. 404.

STATUTES CONSTRUED.

Action, joint, against maker and endorser, 1837, ch. 5, 95.
 “ “ against surviving partner and representative of deceased partner, 1789, ch. 57. 515.
 Administrators. Who are next of kin? 1715, ch. 48. 30.
 Aliens. Capacity to inherit, 1809, ch. 53. 587.
 Attachment for contempt, 1801, ch. 6, sec. 22, 23. 46.
 Attachment, judicial, 1794, ch. 1. 174.
 Champerty, 1821, ch. 66, sec. 1. 400. 409.
 Corporation, power of municipal, to tax, 1806, ch. 33. 1819, ch. 51, sec. 2. 61.
 Entry. 1823, ch. 260. 53.

STATUTES CONSTRUED.—Continued.**FELONIES.**

- False pretences. 1829, ch. 23, sec. 50. 37.
 Passing counterfeit coin. 1829, ch. 23, sec. 39. 79.
 Forgery. 1829, ch. 23, sec. 40. 349.
 Assault with intent to murder. 1829, ch. 23, sec. 3. 439.
 Assault by slave with intent to ravish. 1832, ch. 75, sec. 1:
 1835, ch. 19, sec. 10. 451.
 Assault by a slave with intent to murder. 1835, ch. 19.
 455.
 Passing counterfeit Bank notes. 1829, ch. 23, sec. 33. 494.
 Frauds and perjuries. 1801, ch. 25, sec. 1. 308.
 Insolvent debtor. 1831, ch. 40. 446.
 Justices, jurisdiction of. 1831, ch. 59; 1835, ch. 17. 322.
 Levy. 1794, ch. 1, sec. 23.
 Limitation, acts of. 45, 137, 163, 166.

MISDEMEANORS.

- Betting on elections. 1823, ch. 25, sec. 2. 132.
 Betting on elections, ch. 25. 301.
 Betting on horse race. 1824, ch. 5. 424.
 Carrying bowie knife. 1837-8, sec. 2. 154.
 Encouraging gaming. 1799, ch. 8: 1824, ch. 5. 397.
 Keeping tippling house. 1838, ch. 120. 315.
 Malicious mischief. 1803, ch. 9, sec. 2. 39.
 Occupant right. 1837-8, ch. 1. 386.
 Processioning. 1819, ch. 1. 287.
 Do. 1806, ch. 1, sec. 21. 285.
 Pleading, non est factum. 1819, ch. 42, sec. 1. 493.
 Registration. 1831, ch. 90. 298, 473. 116.

SHERIFF.

- Motion against, for escape, 1803, ch. 18. 136.
 Do. against, for false return. 1835, ch. 19, sec.
 6. 386.
 Do. against, for taxes. 1835, ch. 15, sec. 14, 15. 421.
 Do. for insufficient return. 1835, ch. 17, sec. 5. 449.
 Do. for failure to return. 1777, ch. 8, sec. 2. 390.
 Do. for insufficient return. 1837-8, ch. 190.
 Do. by, on bond of indemnity. 1825, ch. 40.
 Security, judgment by, against principal. 1801, ch. 15.
 " of administrator, how and when discharged. 1813,
 ch. 119. 520, 242.
 " discharged on refusal of principal to sue. 1801,
 ch. 18. 320.
 Statutes, directory. 53, 147. 386.
 Wills, of personalty, how proven. 1789, ch. 23. 180.

SUMMARY PROCEEDINGS.

See MOTION. SHERIFF.

SURETY OF THE PEACE.

See **CRIMINAL LAW. MISDEMEANOR.**

TAXES.

See **SHERIFF, 17, 18, 19. CORPORATION, 1, 2.**

TENANTS IN COMMON.

1. A tenant cannot dispute the title of his landlord, or set up in opposition thereto an outstanding title. *Washington vs. Conrad, 562.*
2. Where one does not obtain possession from another, but being in possession, acknowledges his title or attorns to him, he is not estopped from showing that he was mistaken in supposing the title to have been in such person. *Ibid.*
3. The relation of tenants in common, stands on grounds entirely different from that of landlord and tenant. Each tenant in common enters as owner, and holds possession for himself, and is not estopped by the admission of a co-tenancy from setting up a better title in himself or others. *Ibid.*

TIPPLING HOUSE.

See 316, 319. See **CRIMINAL LAW. MISDEMEANORS.**

TITLE, STATUTORY.

1. The act of 1823, ch. 260, authorizing certain commissioners specified in said act, "to select one hundred and sixty acres of vacant and unappropriated land in said county of Monroe, and obtain a grant for the same from the Register of East Tennessee, in their names as commissioners," for the purpose of establishing a county seat in said county, was intended to enable the said commissioners to obtain a statutory title for the amount of land authorized to be selected in a mode different from that of general entry. *McConnell vs. Commissioners, 53.*
2. The commissioners determined upon the selection of a quarter section, gave the Entry Taker, before the opening of his office, the number of the quarter section, and the name of the county seat was written across the quarter section on the map of the district; Held, that such acts constituted a selection and appropriation of the quarter section in question by the commissioners for the purpose aforesaid, and was the inception of a statutory title which could not be defeated by any subsequent entry after the opening of the office. *Ibid.*
3. The 7th section of the act declares that the commissioners shall not sell the lots until they had acquired a title to the property bargained for: Held, that this section is merely directory in its character: the fact that the commissioners did sell lots after the appropriation and before obtaining

TITLE, STATUTORY.—*Continued.*

the grant, would not render void the previous selection and appropriation of the land so as to subject the land to entry. This question could only be raised by purchasers at the sale of the lots. *Ibid.*

TREATY.

See **GRANT**, 2.

TRESPASS.

1. Trespass for the false imprisonment of a freeman as a slave. See **FREEDOM**. *Woodfolk vs. Sweeper*, 88.
2. Trespass of slave by command of master, master liable. *Wilkins vs. Gilmore*, 140.
3. In this action the jury are not confined to the mere amount of pecuniary loss sustained, but may give vindictive damages. *Ibid.*
4. If a parent inflict unreasonable and cruel chastisement upon a child, it is an indictable trespass. *Johnson, et ux. vs. The State*, 283.
5. Trespass *quare clausum fregit*, is a local action, and the land upon which the trespass is committed, must be proved to lay in the county in which the action is brought. A verdict does not cure deficiency of proof in this respect. *Roach vs. Damron*, 425.
6. See **TROVER**.
7. When a trespass will be enjoined in chancery. See *Franklin & Columbia T. C. vs. Campbell*, 467. *Hadley et ux. vs. H. T. Co.* 555.
8. Neal, the owner of a field, leased eight acres thereof to Henly, the whole being under a common enclosure, without any division fence. Neal turned his stock upon the ground possessed by himself, and they went thence to the land occupied by Henly, and consumed his crop: Held,
 1st. Henly was not bound to erect a division fence, nor to aver his declaration that Neal was bound to do so.
 2nd. Neal having leased the land to Henly, he had no right to prevent him from reaping the benefit thereof, and the removing of the enclosure so as to let in his stock, was an actionable injury.
 3d. The injury being the immediate and direct consequence of the act of Neal, and the act having been wilful, trespass *vi et armis* was the appropriate and only remedy. *Henly vs. Neal*, 551.
10. Johnson attempted illegally to chastise the slave of Perry: the slave got loose and in flight jumped down a precipice

TRESPASS.—Continued.

and fractured his leg: Held, that trespass *vi et armis*, was the appropriate remedy; the injury being direct, whenever there has been an illegal act done, and the consequence thereof, such as might reasonably have followed. *Johnson et als. Perry*, 569.

11. Where the leg of a slave is broken and damages are given for the deteriorated value of the slave in consequence of this permanent injury, such damages are in lieu of loss of service as being in full compensation for the wrong done. *Ibid.*
12. Proof of medical bills contracted and paid after the issuance of the writ, is not competent evidence, nor proof of any collateral damages arising after suit instituted; proof may however be received that the slave died after the suit was instituted, or that the injury proved to be greater by lapse of time, such results being the immediate consequences of the trespass. *Ibid.*

TROVER.

The fact, that A. has personal property within the enclosure of B., does not authorise A. to enter the enclosure of B. for the purpose of taking his property. He should demand it of the owner of the land, and if he refused him permission to take it, such refusal would be evidence of a conversion, for which an action of trover would lie. *Roach vs. Damron*, 425.

TRUST, DEED OF.

1. Not fraudulent because the maker thereof retains possession of goods, by the terms of the deed, for the purpose of fulfilling the objects of the trust. 272.
2. See WILL, 1.
3. See EXECUTOR.

USE AND OCCUPATION.

See ASSUMPSIT, 5.

VENDORS AND PURCHASERS.

1. Fraud of vendee barred by time. See LIMITATION ON SUITS, 1.
2. Innocent purchasers. See *McConnell vs. Commissioners of M.* 53.
3. Vendee has no claim upon vendor for money paid by him in discharging incumbrances where he takes a deed without warranty, and there is no fraud. *Jobe vs. O'Brien*, 34.
4. Vendee may maintain assumpsit for purchase money, where

VENDORS AND PURCHASERS.—*Continued.*

the contract is vacated by return and acceptance of personal property sold. *Williams vs. Hurt*, 68.

5. A vendor who conveys land can have no lien or priority of satisfaction of the unpaid purchase money over other creditors of the vendee. *Roberts vs. Rose & M.* 145.
6. A parol rescission of a written contract may be set up in equity in bar of an application for a specific performance; such parol rescission must however be clearly and satisfactorily made out in proof, and the terms of it fully complied with and executed. *Walker vs. Wheatly*, 119.
7. Where a parol agreement to rescind a bond to convey land, had been made, and the bond for title and the note executed for the payment of the balance of the purchase money had been deposited in the hands of a third person to be delivered over to the parties entitled thereto, when the money which had been paid by the vendee should be returned: Held, that this agreement to rescind continued an executory agreement till the money advanced was repaid, and that such parol agreement was not so far executed as to defeat an application for a specific performance. *Ibid.*
8. A vendor is presumed to intend to retain his lien upon conveyed real estate for the purchase-money, and the circumstances which manifest the non-existence of such intention must be shown by the vendee. *Campbell vs. Baldwin*, 248.
9. A note given for the purchase-money with the endorsement of a third person is evidence that the vendor intended to waive and abandon his lien on the estate sold, for the payment of the purchase money. This evidence, however, may be repelled by the vendor. *Ibid.*
10. Where a bill was filed to subject real estate to the lien of the vendor, and the deed by which such real estate was conveyed, recited that the vendor had taken notes endorsed by third persons, as a security for the payment of the purchase money: Held, that said bill was not bad on demurrer, as the complainant had alleged therein, that it was not his intention in the taking of such endorsed notes, to relinquish his lien. *Ibid.*
11. Where goods were obtained by fraud, or upon conditions which were never performed, the right to them remains in vendor. *Saunders & Martin vs. Turberville, et als.* 272.
12. A warranty does not extend to defects which are visible to the vendee at the time of sale and warranty or to those of which the vendee is cognizant. *Long & Byrne vs. Hicks*, 303.

VENDORS AND PURCHASERS.—*Continued.*

13. Authority of agent to buy or sell personal or real property, expires on the death of principal. See *Rigs vs. Cage*, 350; *Jenkins vs. Atkins*, 1 Humphreys.
14. See CHANCERY, 1, 9, 10, 11, 12, 13, 21, 28, 30.

VERDICT.

1. In an action of trespass *quare clausum fregit*, a verdict does not cure a deficiency of proof as to what county the land trespassed upon lays in. *Roach vs. Damron*, 425.
2. The verdict of a jury is presumed to be correct, when the court is not informed by the nature of the case or by a statement in the bill of exceptions, that it contains all the evidence. *Ibid.*
3. Where, from the nature of the agreement, a special demand is necessary, but the demand is not averred in the declaration, such omission will be cured by verdict, and the formal "*sæpius requisitus*" held sufficient; and this upon the ground, that a recovery would not have been suffered by the court, unless a special request had been shown in proof. *Rodgers vs. Love*, 417.
4. It is necessary to a recovery by the holder of a note against an endorser to aver and prove demand and notice, and the want of such averment is not cured by verdict. *Knott vs. Hicks*, 162.

WARRANT FOR LAND.

See ENTRY.

WARRANTY.

A warranty does not extend to defects which are visible to vendee at the time of the sale and warranty, or to those of which the vendee is cognizant. *Long & Byrne vs. Hicks*, 305.

WATER COURSE.

Respective rights of riparian proprietors. *Webster vs. Fleming and Frierson*, 518.

WIDOW.

A widow, as such, is not next of kin to her deceased husband. *Wilson vs. Frazier and McKinney*, 30.

WILLS.

1. Porter devised his real and personal property to his wife Sarah with power to appropriate and dispose of the same as she might deem proper amongst her children: Held, that Sarah Porter under this devise held this property subject to

WILLS.—Continued.

- a trust for the benefit of her children. *Jarnagin vs. Conway*, 50.
2. A power of appointment to children, does not authorise appointment to grand children. *Ibid.*
 3. It is a principle sanctioned by reason and authority, that when one engages in an act so solemn and important as the execution and publication of a last will and testament, he is not to be presumed as intending in reference to any portion of his property to die intestate. *Ibid.*
 4. It is a rule in the construction of last wills and testaments well settled, that the scope and import of the entire instrument are to be considered for the purpose of discovering the intention of the testator; and that such intention, when once discovered, is of paramount and controlling importance. *Ibid.*
 5. A testatrix made a last will and testament in which were these words, "I bequeath all the balance of my property, both real and personal, that I am possessed of, consisting of four negroes, viz. Charlotte, Abraham, Ann and Warner, household and kitchen furniture, stock of all kinds, wagons, goods," &c.: Held, that the testatrix intended to devise all the balance of her earthly estate; that the general phrases, "all my property, both real and personal," embraced four thousand dollars in cash not mentioned, and that the subsequent specification of property does not restrict the operation of the above general phrase. *Ibid.*
 6. A will of slaves may be proven by one subscribing witness, where there is no contest as to its validity; and it being admitted that such will was duly proven by one witness, it will be inferred such witness was a subscribing witness, and the will would, therefore, be regarded as proven according to the forms of law. *Rogers vs. Winton*, 178.
 7. A writing offered for probate as a last will and testament may be established though it be not executed, and in some instances, though it be imperfect; but such want of execution and such imperfection must not result from an abandonment or change of purpose, but from the act of God which defeats the completion of it. *Guthrie vs. Owen*, 202.
 8. The presumption of law is against the testamentary validity of every paper offered for probate, which is unexecuted or imperfect. *Ibid.*
 9. A paper writing offered for probate as testamentary, may be set up as a will of personal estate and rejected as a will of real estate. *Ibid.*

WILLS.—Continued.

10. Where the will is imperfect, it must appear from the face thereof, that the establishment of it as far as it goes, is *so far* the entire will of the deceased, and that *so far* does not thwart or defeat the wishes of the deceased, but carries them into effect. *Ibid.*
11. Gill made a conveyance of certain slaves to his wife, to take effect after his death, the said slaves at the time of such conveyance belonging to him and being in his possession: Held, that this deed was void and conveyed nothing to the wife. *Perry and Patterson vs. Gill*, 218.
12. Where such conveyance of slaves in remainder by the husband as aforesaid, also contained a stipulation, that if she died before him she might dispose of such slaves by will, and the wife did so dispose of them and died: Held, said will passed no interest in the slaves. If, however, he had probate made of it and delivered the slaves in accordance therewith, the property passed, creditors being out of the question. *Ibid.*
13. Where, however, there was no probate made by the husband after the death of the wife and no delivery made, and the property by the effect of the instruments and the conduct of the husband in connection therewith transferred the slaves to the appointees of the wife as the donees of the husband: Held, that the administrators of the wife with the will annexed, would not be entitled to a decree for the slaves or an account for hire, they having no interest except in their representative character and in the testamentary validity of an instrument of which probate had been made. *Ibid.*
14. See *Taylor vs. Taylor*, 597.

WITNESS.

1. Moffit and Taylor were jointly indicted, and Moffit put on his trial first: Held, that the wife of Taylor was a competent witness for Moffit. *Moffit vs. The State*, 99.
2. When one partner is a competent witness for his co-partner, and for what purpose. *Vanzant vs. Kay, Thomas & Co.*, 109.
3. Witness subscribing to a deed.
See PROBATE.
4. Witness subscribing to a Will.
See WILL, 6.
5. A register who corrects an incorrect registration, is a competent witness to prove the correction and the date thereof in a suit between third persons. *Baldwin vs. Marshall* 116.

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